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A PRACTICAL EXPOSITION

OF THE

PRINCIPLES OF EQUITY,

ILLUSTRATED BY THE

LEADING DECISIONS THEREON.

FOR

Students and Practitioners.

BY

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PREFACE.

IN the course of his own reading for law examinations, and in directing the studies of others, the author has often experienced a difficulty in distinguishing between the principles of law and equity for the time being in force, and doctrines which have been rendered obsolete by the course of recent decisions or the current of legislation ; and he has observed that this difficulty is often traceable to the fact that though the standard books in use have, whilst passing through their many editions, recorded the bare results of changes, yet no attempt has been made to modify accordingly the general outline and classification of the subject.

Another frequent difficulty has been to meet the requirements of examiners by establishing a clear association of leading principles with leading cases. It is indeed true that many works designed to effect this object are before the public, all, as far as equity is concerned, deriving their inspiration from the invaluable work of Messrs. White and Tudor. But this work, to which almost all living writers on the subject must acknowledge their obligations, is too voluminous for convenient use by students, and, moreover, it makes no pretension to a classification of its admirably selected cases, or to any systematic exposition of the principles of equity. The other works referred to are, on the contrary, all of them too small and elementary to be relied on alone. Readers have, therefore, been compelled to refer to one book as their main informant on their subject, and to another as a means of cementing the association between its leading doctrines and its leading decisions.

It has been the author's especial design in the preparation of this work to meet both these difficulties. With respect to the former of them, such an effort has been rendered all the more necessary by the extensive and radical change which was effected by the Judicature Acts of 1873 and 1875. Not only is detailed

reference to the provisions of these statutes necessary under almost every branch of the subject, but the fusion of equity and law thereby effected demands a fundamental change in the general classification and division thereof. It is evidently no slight advantage to the reader to have before him a classification based on existing conditions, rather than one which, having been devised under very different circumstances, has been from time to time corrected and modified in an unsystematic and disjointed manner.

But besides these statutes of supreme importance, there are many others which, not being retrospective, have introduced new law without rendering the old obsolete. In such cases the student has to learn two sets of doctrines, one of which is applicable to one set of cases, another to another. In order to avoid confusion in these circumstances the author has been careful to indicate the difference by the use of appropriate tenses, as well as by marking the change conspicuously in the division of the various chapters and sections. This may be illustrated by reference to the recent Real Property and Conveyancing Act (1881), the provisions of which, so far as bearing upon the matters discussed, have been fully set out.

With the view of bringing important leading cases prominently before the eye of the reader, they have been conspicuously printed under their respective headings. The selection of Messrs. White and Tudor has been followed in the main, as not only being excellent in itself, but as being familiarly known by the profession, and more or less so by all who have entered upon the study of equity. It has, however, been supplemented by many additional cases bearing on matters not treated of by those learned authors.

It is hoped that the designs thus attempted will prove to have been accomplished, at least to a sufficient degree to confer some benefit upon the present and future members of the profession.

H. A. S.

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THE PRINCIPLES OF EQUITY.

INTRODUCTION.

- I. *Design of the Work.*
- II. *Division of the Subject.*

I. THE design of this work is to present within moderate dimensions as complete a view of English equitable jurisprudence as is necessary for meeting the requirements of the examinations in this subject, and for a clear understanding of the cases which most frequently present themselves in the practice of the profession. Design of the work.

For this purpose it has not been deemed necessary to enter into the attractive subject of the history of equity. Not historical. To do this effectively would require more space than could well be spared in a work of moderate dimensions, the contents of which must necessarily extend over a wide field of inquiry; and to attempt to compress so extensive a subject within very narrow limits would perhaps be worse than useless. Occasionally, indeed, something in the nature of an historical retrospect is necessary for the explanation of certain features of the jurisprudence; and in these cases, for instance in introducing the subject of trusts, we have, as concisely as has seemed to us consistent with clearness, narrated the steps by which the jurisdiction has become established. Such glances at history, however, are only introduced as ancillary to the comprehension of the principles concerned, and are not designed

to serve the purposes of those who desire to be well informed respecting the origin and growth of the jurisdiction of the Court of Chancery.

Classifica-
tion and
division of
the sub-
ject.

II. It is a truism to say that a treatise designed as an exposition of so complex and intricate a subject as equitable jurisprudence requires to be systematic in form. Its multitude of details can only be brought within the reach of an ordinary memory through the means of a most careful classification. Yet to devise a system of classification which shall be at once logical, adequately comprehensive, and simple, is a problem of no slight difficulty; and scarcely two writers have agreed in its solution.

Story's
division
obsolete.

The division which is perhaps most familiar to modern students is that of Story, which distinguishes between the concurrent, the exclusive, and the auxiliary jurisdiction of the Courts of equity. This classification has in the main been followed in Snell's "Principles of Equity." It would be a presumption here to praise or criticise the conclusion of so great a writer, and it argues no disrespect for it that it is not here followed. However excellent a division at the time at which it was devised, it has, we think, ceased to be appropriate, simply because recent legislation has caused it to cease to be true. Since it has been enacted (*a*) that in every civil cause or matter commenced in the High Court of Justice law and equity shall be administered concurrently, and that whenever there is a conflict between the rules of common law and those of equity the rules of equity shall prevail, it is plainly an anachronism to speak of the exclusive jurisdiction of Courts of equity. It is indeed true that by the same Act (*b*) certain matters are specially assigned to the Chancery Division, and to the other divisions of the High Court respectively; but that this special assignment does not establish anything of the nature of an exclusive jurisdiction is plain: "All the judges of the High Court have

Jud. Act.
1873,
ss. 24, 25.
Exclusive
jurisdic-
tion.

(*a*) 36 & 37 Vict. c. 66, ss. 24, 25. (*b*) s. 34.

the same jurisdiction, and it is clear that any judge may, if he chooses, when an action has been brought in the wrong division, retain the action and exercise the jurisdiction " (c).

Still more completely have the Judicature Acts put an end to the auxiliary jurisdiction of equity as such. Formerly there were many cases in which, though the common law remedies were sufficient, and the jurisdiction of Courts of common law was accordingly exclusive, yet it was necessary for one of the parties to have recourse to equity in order to procure requisite evidence for the successful assertion of the legal right. The jurisdiction of equity in these cases rested on the peculiarities of its procedure, and extended no further than was necessary to enable the party to maintain his position at law. The most important illustration of this branch of the jurisdiction was afforded by the stringent powers of equity to enforce discovery. But the Judicature Acts having established a system of procedure common to Courts of law and to those of equity, giving to the former identically the same powers as are enjoyed by the latter, it can no longer be necessary for any one whose action lies at law to seek for any preliminary or auxiliary aid in equity.

Not only, moreover, is the division of equitable jurisdiction into exclusive, concurrent, and auxiliary now obsolete, but we may perhaps venture to remark that it somewhat tended to confuse the student by treating as co-ordinate matters of substance and matters of form; placing side by side as correlative divisions of the subject titles so incongruous as trusts and injunctions, mortgages and interpleaders.

Yet, notwithstanding the fusion of law and equity which has by the Judicature Act been in a great measure effected, the distinction between the two systems must still, for many purposes, be regarded. As long, at least, as the

Auxiliary
jurisdiction.

Law and
equity still
distinct.

terms law and equity are contrasted by examiners, the student must continue to contemplate them as distinct. And further than that, notwithstanding their present concurrent *administration*, the distinction remains substantial and real. The differences between legal and equitable estates and interests and principles continue to exist, and to produce most important results, and if we were to cease to indicate the contrast by the terms legal and equitable, we should have to invent some others for the purpose.

Accordingly it has been found repeatedly necessary for the purposes of classification to refer separately to the treatment of questions by law and by equity, and in other respects to contrast the two systems. It would have been tedious in every such case to remind the student of the provisions of the Judicature Act: it suffices once for all to call attention most emphatically to the change.

Cross-
divisions
unavoid-
able.

It is perhaps impossible in dealing with such a subject as equity to avoid cross-divisions. The principle of trusts, for instance, reaches to almost all parts of the jurisdiction. The whole subject of mortgages might be treated as one sub-division of it; the remedies for fraud chiefly operate through its application; the law respecting married women and infants continually makes reference to it; and yet it would be obviously absurd in writing of equity not to treat such matters as mortgages and the separate estate of married women under completely distinct titles.

Distinc-
tion
between
the juris-
diction
founded on
difference

A mutually exclusive classification of the subject matter of equity must not, then, be expected. The best that can be done is to lay hold of the leading distinctions between the various branches of the jurisprudence, and in the separate investigation thereof to clearly indicate their relation one to another. Story has sub-divided his heading of concurrent jurisdiction into two branches, the one where the *subject matter* constitutes the principal ground of the jurisdiction; the other where the *peculiar remedies* administered in equity constitute the principal ground

of jurisdiction (*e*). Under the changed circumstances of substantive principle, and jurisdiction founded on peculiar remedies, above referred to, which have made all equitable jurisdiction concurrent, this now commends itself as an exceedingly apt and expressive division of the whole subject. It will be observed that it coincides with Bentham's famous division of law into substantive and adjective law. Though it will often, and indeed generally, be seen that the distinctive principles and the distinctive remedies of equity have acted in combination in establishing the various branches of its jurisdiction, yet the contrast between those matters in which the substantive doctrines of equity form the most conspicuous feature, and those in which the peculiarities of its procedure are most prominent, is sufficiently marked to form the groundwork of a scientific classification of the whole jurisprudence.

Adopting this as our main division, the work naturally Adopted. divides itself into two parts. Part I. will comprise those subjects the jurisdiction of equity respecting which originated in, or chiefly rests on, a substantive difference between its principles and those of the ancient common law. Part II. will comprise those branches of the jurisdiction which have arisen chiefly from the peculiarities of its procedure or remedies.

(*e*) See Story's Eq. Jur. preface, and s. 77.

PART I.

WHERE THE JURISDICTION RESTS ON THE DISTINCT SUBSTANTIVE PRINCIPLES OF EQUITY.

INTRODUCTION.

- I. *Meaning of the word Equity.*
 - II. *Distinctions between Equity and Law.*
 1. *Equity acts "in Personam."*

Penn v. Lord Baltimore.
E. of Oxford's Case.
 2. *Equity looks to the Intent rather than to the Form.*
 3. *Equality is Equity.*
 - III. *Contents of Part I.*
-

I. *Meaning of the word Equity.*

ALMOST every writer on equity has been careful to guard against the errors which are latent in the ambiguity of the term equity. Equity, in common parlance, or what may be called its ethical sense, is an abstract name for that which is just, honest, and right, answering very closely to the definition given in Justinian's Institutes of Justice, "*Justitia est constans et perpetua voluntas jus suum cuique tribuendi.*"

Ambiguity
of the
word
"equity."
Its ethical
sense

It is sufficiently evident that in this broad sense equity includes a multitude of matters which are altogether

far too
compre-
hensive for

jurisprudence.

beyond the cognizance of practical jurisprudence. It reaches quite across the field of morality, over only a small portion of which have legal tribunals ever asserted authority.

It is equally plain that were a Court established to decide disputes under the very indefinite guidance of this wide principle, the character of its decisions would be continually varying in accordance with the characters of the judges. Different views on philosophical questions of great intricacy would lead to conflicting sentences respecting the same course of conduct. Such a tribunal might usefully mete out a rude justice to an uncivilised tribe, but could only be productive of wild disorder in the complex circumstances of organised and civilised society.

Equity a principle of general justice.

The term equity has also been used to indicate a principle of general justice as distinguished from strict law; or as modifying or mollifying the operation of the hard and fast rules of law, in consideration of certain circumstances, in which their rigid application would work hardship. To this effect is Papinian's definition of the prætorian law, "*Adjurandi, vel supplendi vel corrigendi juris civilis gratia*" (*f*). This doubtless comes somewhat nearer to the true definition of equity as a technical term of English jurisprudence; and as a matter of history some of the branches of equitable jurisprudence doubtless arose from efforts of the chancellors which might be well described in this language. But it is nevertheless very far from being an accurate expression of what is now meant by equity. On the contrary, it is probable that more cases of admitted hardship now occur in the Courts of equity themselves than in the Courts of common law: not indeed because equitable principles are more defective than those of law, but because the facts to which they have to be applied are of a more complex and ever varying description. From this reason it constantly

Also too wide and indefinite.

happens that cases come before the Court which have not been foreseen and provided for by legislation, whether judicial or statutory, but which must nevertheless be decided on fixed principles, in order to avoid the greater evil of a general ignorance or uncertainty as to what is, and what is not, lawful.

In short, it is necessary in an advanced and civilised community that the laws administered by its Courts should be fixed and determinable at least approximately; the more clearly determinable, the more perfect the jurisprudence. This being so, it is obviously impossible to summarise those laws in a general definition or maxim. No one would dream of describing the law of England or of any country in a single sentence. No more possible is it to describe the equity of England in a single sentence. It is indeed sufficiently difficult to do so in a large volume. All that can be said respecting equity in a general form is that it is that portion of the law of England which in the course of a long history gradually came to be administered in the High Court of Chancery. In so far as the Judicature Act has fused equity and law, equity has no longer any distinctive meaning, except as indicating those principles which were previously distinct from those of common law.

Laws must be determinate,

and cannot be summarised in a definition.

So equity is not to be defined.

Its meaning in English jurisprudence.

II. *Distinction between Equity and Law.*

But the distinction between law and equity has been clearly marked, and has exercised a very important influence in the development of our legal system. Upon it the division of our subject is based, and it is therefore at the outset incumbent upon us to indicate what the leading principles are in which equity for generations so far differed from common law as to have constituted a separate branch of the science of jurisprudence. Hereafter it will be necessary to advert to the peculiarities of equitable procedure; at present the question is, what are the substantive differ-

Distinctive principles of law and equity

ences between equity and law which have been chiefly material in building up the most conspicuous parts of equitable jurisdiction.

expressed
by maxims.

These principles have usually been expressed by text-writers in a series of maxims, which are often quoted by judges in Courts of equity. It is only requisite here to allude to and explain the most important of these. Others of less influence will be referred to in the subsequent portions of our investigation.

1. *Equity acts "in personam."*

Different
meanings
of "*in*
personam,"

jus in
personam,

actio in
personam,

judgment
in per-
sonam.

The expression "*in personam*" is employed in jurisprudence in a variety of connexions, and with a variety of shades of meaning. In this maxim its signification is somewhat different from that which it bears in other and equally familiar contexts. Students of jurisprudence are familiar with the distinction between *jus in rem* and *jus in personam*, the former indicating a right available against all the world, or people generally; such rights, for instance, as that which a man has to his life, his property, and his reputation; the latter indicating a right which can only be asserted against a particular person or a definite number of persons, such as a right arising from contract, or a right to damages against a person who has infringed or violated a *jus in rem*, or in other words has committed a tort. Analogous to this distinction is that between an *actio in rem* and an *actio in personam* so often appearing in the study of Roman law, the former being an action in which the plaintiff claims as against all the world that some particular thing corporeal or incorporeal is his, the latter an action in which he asserts his claim to an act or forbearance on the part of the individual defendant. The same expression appears also in English common law, which once recognised a distinction between real and personal actions, and which still distinguishes between a judgment *in rem* and a judgment *in personam*, the former being a judgment executed by a compulsory delivery of the specific subject matter in

dispute to the plaintiff, the latter a judgment executed by constraining the person of the defendant.

But in saying that equity acts *in personam*, we use these words with a meaning somewhat different from any of these. Equity protects *jura in rem* as well as *jura in personam*. In the sense which distinguishes actions *in rem* from actions *in personam*, common law quite as often and as fully as equity acts *in personam*. It is equally concerned with rights *in personam*, and it equally enforces its decisions by judgments and processes *in personam*. If this were all that it meant, the maxim under consideration would guide us to no differentiating principle whatever.

In these senses common law acts *in personam* as well as equity.

But this is not all; there are at least two senses in which equity acts *in personam* in which it was not imitated by the Courts of common law. In the first place, regarding its decrees as commands addressed to the defendant personally, rather than as decisions directly affecting the subject matter of the dispute, it carried the consequences of this view much further than did the Courts of common law.

Equity regards its decrees as personal commands,

and carries the consequences of this farther than law.

Of this there are two conspicuous illustrations. First the jurisdiction of equity in suits respecting land situated out of its jurisdiction. Secondly its jurisdiction to restrain proceedings at law.

The leading authority on the first of these matters is—

Illustrations.

PENN v. LORD BALTIMORE.

[1 Ves. sr. 444; 2 W. & T. L. C. 939.]

Penn v. Baltimore.

This case was founded on articles entered into between the plaintiffs and the defendant containing particular provisions for settling land in America by drawing certain lines as therein specified, and that commissioners should do this within a specified time. The bill sought specific performance and execution of these articles.

Lord Hardwicke, after an elaborate judgment, decreed that the relief sought might be granted, on the ground

(*inter alia*) that though the agreement could not be enforced *in rem*, the strict primary decree in that Court was *in personam*; and the defendant being in England it could be enforced by process of contempt *in personam* and sequestration, which was the proper jurisdiction of the Court. But the Court refused to decree quiet enjoyment of the lands, application for that purpose being proper only to Courts having jurisdiction over the land itself.

Situs of the subject matter immaterial,

There are a great number of cases in which the jurisdiction here explained and established has been exercised, and they show that it is not confined to cases where the property in question appertains to the English Crown, as was the case there. It is evident from the principle and *modus operandi* of that judgment that it would be as applicable where the property concerned was strictly foreign as where it was in Scotland or in the colonies. The sole requirement is that the party should be within the jurisdiction, and so subject to the process of the Court (*g*).

if defendant is within the jurisdiction.

Remedies granted respecting property out of the jurisdiction.

In the exercise of this jurisdiction the English Chancery has with regard to foreign lands decreed an account of rents and profits between joint tenants (*h*), enforced specific performance of contracts of sale (*i*), foreclosed mortgages (*j*), declared proprietors trustees (*k*), ordered reconveyances and releases of lands fraudulently acquired (*l*), entertained bills for discovery of rents, profits, and deeds, on the ground of fraud (*m*), and restrained by injunction the prosecution of suits commenced in the *situs* for the recovery of immoveables (*n*).

Limits of the jurisdiction.

The limits of this jurisdiction also well illustrate the maxim in question. They have been concisely laid down

(*g*) *Maunder v. Lloyd*, 2 J. & H. 718; *Toller v. Carteret*, 2 Vern. 494; *Paget v. Ede*, 18 Eq. 118.

(*h*) *Carteret v. Pettus*, 2 Ch. Ca. 214; 2 Swanst. 323, n.

(*i*) *Archer v. Preston*, cited 1 Vern. 77.

(*j*) *Toller v. Carteret*, 2 Vern. 494.

(*k*) *Kildare v. Eustace*, 1 Vern. 419.

(*l*) *Cranstown v. Johnston*, 3 Ves. 170.

(*m*) *Angus v. Angus*, West's ca. t. Hardw. 23.

(*n*) *Bunbury v. Bunbury*, 1 Beav. 318.

as follows : "The claim to affect foreign lands through the person of the party must be strictly limited to those cases in which the relief decreed can be entirely obtained through the party's personal obedience ; if it went beyond that, the assumption would not only be presumptuous but ineffectual." And again, though this power is not restrained by the absence of a similar equity in the *lex situs*, it cannot be exercised where it is absolutely excluded thereby. "If the *lex situs* excludes such equity, then the right to hold the land free from it becomes one of the incidents of property" (o).

Thus, where the lands are out of the jurisdiction, although they be in the colonies, the Court cannot directly affect them. Its action in such cases is strictly and solely *in personam*. It follows that a suit which would require direct dealing with foreign or colonial land cannot be entertained. Thus a partition of land in Ireland will not be decreed in England, as no power could be given to a commission to take the necessary steps there for carrying out the decree (p). The distinction between such a bill and that in *Penn v. Lord Baltimore* is sufficiently clear ; for though in this case the ultimate result might be expected to be a somewhat similar dealing with foreign land, the matter expressly and immediately before the Court was simply the agreement of the parties. Its decree was directed merely to the enforcement of the articles, and could not involve the Court in any direct dealing with the lands. It has been observed that on this ground Lord Hardwicke would not include in the decree a direction for quiet enjoyment, and that he expressly disclaimed any original jurisdiction of the Court to settle boundaries out of the jurisdiction (q).

Reme-
dies which
will not be
granted.

As to the jurisdiction to restrain proceedings at law, the most celebrated authority is—

(o) Westlake's Pr. Inter. Law, 64, 65.

(q) See, however, *Tulloch v. Hartley*, 1 Y. & C. C. C. 114.

(p) *Carteret v. Pettus*, *sup.*

*Earl of
Oxford's
case.*

THE EARL OF OXFORD'S CASE.

[1 Ch. Rep. 1; 2 W. & T. L. C. 590.]

Restraint
of proceed-
ings at law.

In this case a bill was filed in equity in respect of a matter which had been already tried at law; and after the filing of the bill judgment was entered at law. The defendants demurred, relying mainly on the judgment as barring the relief in Chancery; but it was overruled by Lord Chancellor Ellesmere, who said that there was no opposition to the judgment, nor would the truth or justice of the judgment be examined, but yet the chancellor might, where a judgment was obtained by oppression, wrong, or a hard conscience, restrain the person in whose favour it was issued from proceeding upon it.

We shall elsewhere (pp. 623-31) have to consider what remains of this peculiar jurisdiction. At present it suffices to refer to it as an illustration of the extent to which equity carries the principle that its decrees are personal commands.

Both of these cases, it is true, were based upon the peculiar remedies of the Court; but it has nevertheless been considered convenient to refer to them here as striking illustrations of the general maxim.

Equity
acts on the
conscience.

Equity, however, acts *in personam* in another sense, from which proceeds a large proportion of the substantive distinctions between equity and law. Equity acts on the conscience of the parties before it. It regards them not as mere passive subjects, whose position is arbitrarily determined by the application of categorical rules of law, but as moral agents, bound in conscience to act in good faith one with another. As already said, this is far from seeking to miscellaneously enforce moral duties. The limits of the jurisdiction of equity are now clearly defined, and beyond them it is as powerless as common law. But as an historical fact many of the doctrines and much of the practice of equity have originated in this moral view which it

has taken of the parties before it. Thus originated its enforcement of the execution of trusts, its narrow scrutiny of all circumstances that savour of fraud, its relief against hardships arising from unavoidable accidents and innocent mistakes. As these various subjects and others have presently to be considered in detail, it is now only necessary to mention them as illustrations of those views which have been, until recently, peculiar to Courts administering equity as distinguished from law.

Springing from this maxim, as considered in this sense, are others of a more detailed character, such as "He who seeks equity must do equity," "He who comes into equity must come with clean hands." "*Vigilantibus non dormientibus æquitas subvenit.*" The particular application of these will be hereafter seen. It suffices now to remark that they evidently spring from the broad equitable principle of imposing on its suitors a due regard for the obligations dictated by conscience.

2. *Equity looks to the intent rather than to the form.*

This maxim is also of great importance and of wide application. It would indeed be a great error to suppose that its converse would truly describe the principle of the common law. In many respects the Courts of law have been indifferent to matters of form in their vigilance to carry out the true intentions of parties. But equity has certainly carried the principle much further. Thus originated the extensive jurisdiction as to mortgages: law, guided by the form only, treated such assurances as absolute conveyances, and they have accordingly always operated as conveyances of the legal estate; but equity, considering the intention of the transaction to be only to effect a security for a money loan, relieved from the consequences of the legal transfer by creating the estate known as the equity of redemption. From the same principle has sprung the jurisdiction to relieve against penalties and forfeitures generally.

From this maxim also two others have sprung as

Consequences of this.

Derivative maxims.

This also carried farther in equity than in law.

Consequences.

Derivative maxims.

corollaries: "Equity looks on that as done which ought to have been done:" and "Equity imputes an intention to fulfil an obligation." Applying the principles thus expressed, agreements to convey have been treated as equitable conveyances, effect being given to them through the medium of the doctrine of trusts; the doctrine of conversion has arisen, by virtue of which money covenanted or devised to be laid out in land has been treated as land, and *vice versâ*. The doctrines of satisfaction and performance may be traced to a similar origin.

Equality is
equity.

3. *Equality is Equity.*

Illustra-
tions.

This maxim is certainly of a narrower scope than those we have been considering; but its influence is nevertheless apparent in many branches of the jurisdiction. Under the head of resulting trusts we see an instance of this in the tendency to regard a survivor of joint tenants as trustee for the representatives of those who are deceased, as well in the case of joint mortgages as in that of a joint purchase where the money has been advanced in unequal shares. In the administration of assets, also, the same principle finds an illustration in the continual efforts of equity to secure an equal division of assets among creditors of different degrees. The equitable doctrine of contribution in cases of suretyship is of a similar character.

Minor
maxims.

4. Other maxims are often quoted in connexion with these as elucidating the general principles of equity: such are "Equity follows the law;" "Where equities are equal the law shall prevail," "*Qui prior est tempore, potior est jure.*" But these are evidently of much less general application than those above cited. To illustrate them here would necessitate either a repetition, or a trespass upon matter which falls much more appropriately under the detailed consideration of the various subjects before us. They, moreover, add but little information to our present inquiry, which has been to ascertain what are the *distinctive* principles of equity.

III. For our present purpose we think this inquiry is

sufficiently answered by the three leading maxims above quoted, with the illustrations given under each. These direct us to the following subjects as falling under the first division of our work ; that is to say, as falling within the jurisdiction of equity *chiefly* on the ground of its distinctive substantive principles. Contents
of Part I.

1. Trusts.
2. Frauds.
3. Equitable relief against the consequences of Accident and Mistake.
4. Relief against Penalties and Forfeitures.
5. Mortgages and Liens.
6. Suretyship.
7. Modifications of the Law as regards Married Women's Property.
8. The Guardianship of Infants.
9. The peculiar doctrines of Election, Conversion, Satisfaction, and Performance.

CHAPTER I.

TRUSTS.

SECTION I.—GENERAL VIEW.

- I. *Historical Outline.*
- II. *What may be the Subject of a Trust.*
- III. *Who may be a Trustee.*
- IV. *Who may be a cestui que Trust.*
Charities.
- V. *Classification of Trusts.*

 I. *Historical Outline.*

Fidei-
commissa
in Roman
law.

1. Students of Roman law are familiar with the device which was resorted to in the later days of the Republic for enabling testators to dispose of their property in favour of persons who were unable to take it directly by way of inheritance or legacy. Where the civil law threw any impediment in the way of such a disposition as was desired, the practice arose of bequeathing the property to someone who could legally take it, in reliance on, or trusting to his good faith, to carry out the donor's intention with respect to it. Such gifts were known as *fidei-commissa*. At first, the only security for their proper execution was the honour of the person so entrusted; but in the reign of Augustus, though no legal action could be brought for their enforcement, jurisdiction was conferred upon a special prætor to take cognisance thereof, and to carry them into execution. From that time the operation of *fidei-*

commissa revolutionised the testamentary law of the State, and prepared the way for its later development in directions little thought of at the time of their introduction.

2. The history of English law presents to us a very similar chapter. The common law imposed many restrictions upon the conveyance and devising of landed property, which the possessors thereof continually exercised their ingenuity to escape. Ownership in land the law has never recognised. Whoever was in immediate enjoyment of it could claim only an interest of greater or less extent and duration, subject to the rights of a superior lord, or at any rate of the Crown, as chief and paramount lord of all the soil of the country. It is plain that in many circumstances the power of free disposal of these interests might greatly interfere with such rights, especially with the ultimate right of receiving back the land itself. Particularly was this the case where land was transferred or assigned to a corporate body, such as an ecclesiastical order, or a bishopric, which subsisted perpetually, so that such land could never again revert as vacant or undisposed of to a superior lord. Accordingly, by the statutes of mortmain, lands were prohibited from being given for religious purposes.

Common law restrictions on the alienation of land.

Mortmain.

3. It was with a view to elude such restrictions that trusts, or as they were anciently called, uses, were introduced in England. The device was that the transferor, while retaining the legal estate, or conveying it as the law allowed, should declare the use of the estate to some third person, affixing on the conscience of the legal owner the duty of carrying into effect such declared intention. By this means it was sought to transfer the beneficial interest in a manner which the law would not sanction, or to persons or corporations whom the law would have forbidden to receive it.

Introduction and nature of uses,

4. As in the case of the *fidei-commissa* of Roman law, these uses or trusts were originally dependent for their execution entirely upon the good faith or honour of the legal owner or trustee. But in the reign of Richard II.,

at first dependent on good faith.

Writ of
subpœna.

John Waltham, Bishop of Salisbury, who was then Lord Keeper, invented the writ of *subpœna*, by which a refractory trustee might be summoned before the Court of Chancery, there to answer on oath the charges of the beneficiary or *cestui que use*. This Court, claiming a special jurisdiction in matters of conscience, enforced the execution of the use or trust, though without affecting to interfere with the ownership at common law.

Extension
of uses and
trusts.

The addition of this security for the enforcement of uses soon led to their extensive employment. Though arising from the restrictions on the assignment of freehold land, their principle was equally applicable to other kinds of property, and trusts of real and personal chattels came into common use. Trusts came also to be employed for other purposes than the beneficial transfer of property. It was often convenient to give an interest to a trustee for the performance of some specific duty, such as to convey in a given manner, or to sell for payment of debts, &c. More important still was the application of the doctrine by which landowners obtained the power of devising their estates by will.

Statutory
inter-
ferences
therewith.

5. So extensive were the inroads thus made on the policy of the law, especially as to the legal incidents of tenure and the rights of creditors and purchasers, that uses and trusts soon became the subjects of statutory interference (*a*). It is not, however, now necessary to do more than refer to matters so completely obsolete.

Statute
of Uses, 27
H. VIII.
c. 10.

At length it was determined to abolish the application of uses to freehold land entirely, and with that intent the Statute of Uses (*b*) enacted that where any person stood *seised of any hereditaments* to the use, confidence, or trust of any other person, or of any body politic, such person or body politic as had any such use, confidence, or trust, should be deemed in lawful *seisin* of the hereditaments in such

(*a*) 1 Rich. III. c. 1; 19 Hen. VII. c. 15; 26 Hen. VIII. c. 13.

(*b*) 27 Hen. VIII. c. 10.

like estates as they had in use, trust, or confidence. The effect of this was at once to convert all uses into legal estates, and thus to bring them within the rules of law.

The technical meaning of the words employed, however, To what uses it referred. prevented the statute from entirely subverting the doctrine of trusts. The words "*seised*," "*seisin*," and "*hereditaments*" being only applicable to freehold estates, the statute was adjudged not to affect any trusts of personal property Not to personalty, copyholds, or chattels, or even leasehold interests in land, or copyholds. Seeing also that the statute referred only to cases in which one person was "*seised, &c., to the use of any other person,*" it obviously could not affect special uses, or special uses. *i.e.,* uses in which the conveyance was to the trustee for some limited or specific purposes, such as have been mentioned. These trusts, therefore, in which the trustee was not a mere passive owner of a legal estate the benefit of which was secured to someone else, but had active duties to perform, remained as valid as before the statute.

6. This sweeping Act was, however, no sooner passed Effect of the statute destroyed, than its effect was destroyed by the construction put upon it by the judges of common law; and the old uses in real property at once reappeared under the modern name of trusts. This came about as follows. If there was a feoffment to A. and his heirs to the use of B. and his heirs, then before the statute A. took a legal fee simple, and B. was a *cestui que use*, who could only seek his remedies in Chancery. After the statute the same limitation would secure not only the use but also the legal estate to B. The use would, in short, at once draw to itself the legal estate. But the judges held that where there was a limitation to A. and his heirs to the use of B. and his heirs to the use of (or in trust for) C. and his heirs, then the statute had no effect beyond the use limited to B. It converted the use first declared into a legal estate, but in so doing its power was exhausted, and a second use or trust, declared upon or after the first, remained unaffected thereby. Such being the decision of the judges, the Court and con-

sequent
reappear-
ance of
trusts.

of Chancery asserted the same authority over the first *cestui que use* as it had previously exerted over the primary assignee, and enforced upon him the execution of the second use or trust. Thus it has been said that the whole effect of the Statute of Uses was to add four words, "to the use of," to every conveyance.

Trusts having been thus curiously revived, have continued down to the present day; and under the development of the doctrines respecting them which took place under the later chancellors, especially Lord Nottingham, now constitute one of the most advantageous branches of equitable jurisdiction.

Definition
of a trust.

7. It is not necessary to add to this brief sketch a history of the various steps by which trusts have attained their present position in our jurisprudence. Sufficient has been said to indicate the nature of a trust, and to render a more formal definition intelligible. A trust has been defined as a beneficial interest in, or ownership of, real or personal property, unattended with the possessory or legal ownership thereof (c). But this is rather a definition of an equitable estate than of a trust, and it omits to take account of special trusts, such as have been already referred to, in which the object of the trust is the performance of some particular duty rather than the vesting of the beneficial ownership in some person other than the legal owner. A trust is rather a duty deemed in equity to rest on the conscience of a legal owner. This duty may be either passive, such as to allow the beneficial ownership to be enjoyed by some other person, named the *cestui que trust*, in which case the legal owner is styled a bare trustee; or it may be some active duty, such as to sell, or to administer for the benefit of some other person or persons; such as the duties of a trustee in bankruptcy.

(c) 2 Spence, 875.

II. *What Property may be the subject of a Trust.*

As a general rule property of any kind, legal or personal, may be made the subject of a trust.

We have seen that trusts arose chiefly in connexion with freehold estates. They are equally applicable to copyholds, or to lands subject to any special customs, such as gavelkind or borough English. In such cases equity as usual follows the law in its treatment thereof: thus equitable estates will be guided by the same rules, as to descent for instance, as legal estates in the same land.

Courts of equity will also, as seen in *Penn v. Lord Baltimore* (*sup.* p. 11), enforce natural equities in and contracts respecting colonial or foreign land, provided the parties be within the jurisdiction and the case admits of a remedy by action *in personam* (*d*). But trusts, strictly so called—that is, trusts of the nature of the ancient uses—cannot, it would seem, be engrafted upon foreign real estate, the tenure of which may have no harmony with the principles of English law (*e*).

Trusts are applicable to leaseholds, personal chattels, choses in action, and every description of personal property, and on the principle that *mobilia sequuntur personam*, as long as the party is domiciled within the jurisdiction of the Court, it matters not where the property in question is situate. The only limit is that in the case of property lying beyond the reach of the Court the practical obstructions in the way of executing the trust may be sometimes a bar to relief.

(*d*) *Norris v. Chambers*, 3 De G. F. & J. 584.

(*e*) Lewin, p. 45, 7th edit.

III. *Who may be a Trustee.*

Proper
qualifica-
tions of
trustee.

In order to a person being a trustee, he must be capable of taking and holding the property of which the trust is declared, and competent to deal therewith. He should also be within the reach of the arm of the Court, or in other words, domiciled within its jurisdiction.

Sovereign.

(1.) The sovereign may sustain the character of a trustee, so far as regards the capacity to take the estate and to execute the trust. It is not clear, however, by what machinery a trust so vested could be enforced. Probably the only resource for such a purpose would be a petition of right (*f*).

Corpora-
tion.

(2.) A corporation may now be a trustee, since the ancient doctrine that trusts rested on the foundation of personal confidence has evaporated. There is ample jurisdiction in the Courts to enforce the performance of its duty by such a trustee (*g*). The only restriction is that the license of the Crown is necessary for the conveyance of real estate to a corporate body; and this restriction is as applicable to a bare legal estate as to a beneficial interest.

A married
woman.

(3.) A married woman is legally capable of being a trustee; but her general amenability to the influence of her husband, the fact that he would be liable in case she should commit a breach of trust, and would thus for his own protection be prone to interfere with her in the discharge of her duties, and the impediments in the way of her execution of legal assurances, afford sufficient grounds for considering such an appointment undesirable, except for special reasons (*h*). On similar grounds it is not generally advisable to make an unmarried woman a trustee,

(*f*) Lewin, 7th ed., p. 30.

(*g*) *Att.-Gen. v. St. John's Hosp.*,

2 De G. J. & S. 621.

(*h*) *Drummond v. Tracy*, Johns.

608, 611.

since, if she should marry, the above disadvantages would at once arise.

(4.) An infant is under still greater disabilities, having An infant. no legal capacity or discretion. Any of his acts, beyond such as were merely ministerial, would be void. He could not be held guilty of a breach of trust. A case, therefore, is scarcely conceivable in which circumstances could warrant such an appointment.

(5.) Formerly an alien, being disabled from holding An alien. English freeholds or chattels real, could not be a trustee of such. There was never, however, any legal objection to his appointment as trustee of chattels personal; and since the Naturalisation Act, 1870 (*i*), an alien may hold property of any description, and may accordingly be trustee thereof.

(6.) Bankrupts are not absolutely disqualified from Bankrupts. being trustees, and a person's bankruptcy has no operation upon the trust estate vested in him. The undesirableness, however, of entrusting property to such hands is sufficiently apparent.

(7.) Lastly, it is a maxim that equity never wants a Equity never wants a trustee. trustee; and wherever by the declaration of a party or by operation of law a trust exists, equity will follow the legal estate, in whatever hands it may be (except those of a purchaser for value without notice), and enforce the execution of the trust. The lapse of the legal estate has no influence upon the trusts to which it is subject. If the persons named as trustees fail, either by death, or refusal to act, or otherwise, the Court will provide a trustee; and if no trustees are appointed at all, the Court itself assumes the office, and will execute the trust.

(*i*) 33 Vict. c. 14.

IV. *Who may be a cestui que Trust.*

Generally any one who can hold legally. 1. As a general rule anyone who is capable of taking a legal interest in property may, through the medium of a trust, enjoy an equitable interest therein. But this is not all; for in certain cases persons may take an equitable interest to whom a legal estate could not be similarly limited.

Married women's separate estate. (1.) Thus an equitable interest may be conferred upon a married woman to her separate use, free from the control or participation of her husband; while at law no property could be so limited as to exclude the rights of her husband during the coverture.

The sovereign. (2.) A trust may be declared in favour of the sovereign, without the restriction which formerly existed, that the title of the property so limited should be matter of record.

Alien. (3.) An alien might always have been a *cestui que trust* of personalty, and therefore, as it was held, of the proceeds of land directed to be sold, which was in equity considered as if it already were in the form of money. Before the Naturalisation Act, 1870 (*k*), a trust of realty might have been declared in favour of an alien, and might have been enforced by him against all save the Crown. The Crown, however, might have secured the beneficial interest by suit against the trustee. By that Act real property was, as we have seen, placed in this respect on the same footing as personalty.

Corporation. (4.) A trust of lands cannot be limited to a corporation save by license from the Crown. There is no such restriction to the enjoyment by a corporation of an equitable interest in personalty.

Charities. (5.) A legal estate cannot be limited to the objects of a

(*k*) 33 Vict. c. 14.

charity, as to the poor of a parish in perpetual succession ; but in a Court of equity, where feudal rules do not apply, the intention of the donor will be carried into effect, unless within the prohibitions of the Mortmain Act (*l*) as to alienations of land.

2. Trusts in favour of charities, being in some respects peculiar, require a separate consideration, for which this is a convenient place. Charitable Trusts.

(1.) Whatever may have been the origin of the equitable jurisdiction as to charities, it was by the statute 43 Eliz. c. 4. 43 Eliz. c. 4. that its limits and *modus operandi* were first clearly established ; and it is to that statute that we must look for a definition of what objects are included under the term "charity" (*m*). In the preamble thereof the following objects are mentioned : "The relief of aged, impotent, and poor people ; the maintenance of sick and maimed soldiers and mariners ; schools of learning, and scholars in universities ; the repair of bridges, ports, havens, causeways, churches, sea banks, and highways ; the education and preferment of orphans ; the relief, stock, or maintenance of houses of correction ; the marriages of poor maids ; the supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed ; the relief or redemption of prisoners or captives ; the aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers, or other taxes." The term charity in the sense in which it is used in Courts of equity includes only such bequests as are within the letter and spirit of this enumeration (*n*). The tendency has been to give to these words a liberal interpretation, and that being so, they will be seen to cover a very wide range of objects. There are, however, many cases in which relief has been refused on the ground that the objects were not such as could be brought under any of the terms employed. Thus no What are charitable objects.

(*l*) 9 Geo. II. c. 36.

(*m*) Story, 1145, 1155.

(*n*) *Morice v. Bp. of Durham*, 9

Ves. 399, 405 ; 10 *ib.* 522, 541 ;

Kendall v. Granger, 5 Beav. 300,

302 ; Story, 1155, 1158.

What not so.

superstitious uses, such as to pay for prayers for the dead (*o*), or the maintenance of a lamp in a church or chapel (*p*), are within its purview; nor will general expressions of intended benevolence be carried into execution (*q*).

Charitable trusts regarded with favour.

(2.) But wherever a valid charitable trust appears, a Court of equity is always disposed to treat it with favour, and in many circumstances it applies to them a more liberal construction than it would in the case of a gift to an individual. The following cases afford illustrations of this:—

Thus Court will prevent a lapse,

(i.) If a testator gives his property to such person as he shall hereafter name to be his executor, and afterwards appoints no executor, or having appointed one, he dies in the testator's lifetime, such bequests will fail, and the next of kin will take the estate, as in a case of intestacy. But if a like bequest be given to an executor in favour of a charity, the Court will supply the place and carry it into effect (*r*).

(ii.) If an estate is devised to such an individual as the executor shall name, and no executor is appointed, or one being appointed dies in the testator's lifetime, the disposition fails. But such a gift in favour of a charity would be executed (*s*).

and supply defective directions.

(iii.) If a testator has expressed an absolute intention to give a legacy to charitable purposes, but has left uncertain, or to some future act, the mode by which it is to be carried into effect, then a Court of equity will of itself supply the defect and enforce the charity (*t*).

Doctrine of *cy-pres*.

(iv.) Where the literal execution of the trusts of a charitable gift becomes inexpedient or impracticable, the Court will execute them *cy-pres*, *i.e.*, following as nearly as

(*o*) *West v. Shuttleworth*, 2 My. & K. 684.

(*p*) Story, 1164.

(*q*) *Ellis v. Selby*, 7 Sim. 352; 1 My. & Cr. 286; *Leavers v. Clayton*, 8 Ch. D. 584.

(*r*) Story, 1168; *Mills v. Farmer*,

1 Mer. 55, 96; *Pocock v. Att.-Gen.*, 3 Ch. D. 342.

(*s*) Story, 1168; *Moggridge v. Thackwell*, 7 Ves. 36.

(*t*) *Att.-Gen. v. Syderfin*, 1 Vern. 224; 2 Freem. 261.

it can the original purpose. This important principle of *cy-pres* is thus expressed by Lord Eldon: "If a testator has manifested a general intention to give to a charity, the failure of the particular mode in which the charity is to be executed shall not destroy the charity; but if the substantial intention is charity, the law will substitute another mode of devoting the property to charitable purposes, though the formal intention as to the mode cannot be accomplished" (*u*).

Thus where a charitable bequest is so given that there can be no objects, the Court will order a new scheme to execute it; or when the specified objects cease to exist the Court will new model the charity. A commonly quoted and striking illustration of this is seen in the case of

ATT.-GEN. v. THE IRONMONGERS' CO.

[2 Beav. 313],

where there was a bequest of the residue of a testator's estate to a company to apply the interest of a moiety "unto the redemption of British slaves in Turkey or Barbary," one-fourth to charity schools in London and its suburbs, and one-fourth towards necessitated freemen of the company. There being no British slaves in Turkey or Barbary to redeem, the Court directed a master to approve of a new scheme *cy-pres*, and sanctioned a scheme which gave the moiety thus undisposed of to the donees of the other fourth parts (*v*).

All these doctrines proceed upon the same ground; namely, that it is the duty of the Court to effectuate the general intention of the testator. And accordingly the application of them ceases whenever such general intention is not found. If, therefore, it is clearly seen that the testator had one particular object in his mind, as, for example, to build a church at W., and that purpose cannot be answered, the next of kin will take, there being no general

Particular
charitable
design dis-
tinguished
from
general.

(*u*) *Moggridge v. Thackwell*, 7 Ves.
36, 69.

(*v*) *Story*, 1170 a.

charitable intention (*w*). Also if the charity be of a general indefinite or merely private nature the disposition will be treated as utterly void. In such a case, as the trust is not ascertained, the fund must go either as an absolute gift to the individual selected to distribute it, or to the next of kin: and it is a general principle that if a testator means to create a trust, and does not effectually do so, the trustee may not benefit thereby; the next of kin therefore will be entitled (*x*).

Defective conveyances remedied.

(v.) In further aid of charities, the Court will supply all defects of conveyances where the donor has a capacity and a disposable estate, and his mode of donation does not contravene the provisions of any statute. Thus it used to supply the want of a surrender of copyholds, and it has dispensed with a strict compliance with the terms of a power; but it would not carry into execution a will not made with the formalities required by the Wills Act (*y*).

Assets not marshalled in favour of charities.

The general favour shown by equity for charities does not, however, go so far as to permit of the marshalling of assets in their favour. Thus if a testator give his real and personal estate to trustees upon trust to sell and pay his debts and legacies and apply the residue to a charity, equity will not marshal the assets by throwing the debts and legacies upon the proceeds of the real estate and chattels real in order to leave the pure personalty for the charity. The fund will be appropriated as if no legal objection existed as to applying any portion of it to the charity; and such proportion of the charity legacies will be held to fail as would in that way fall to be paid out of the prohibited fund (*z*).

(*w*) Story, 1182; *Clark v. Taylor*, 1 Drew, 642; *Fisk v. Att.-G.*, 4 Eq. 521.

(*x*) Story, 1183; *Stubbs v. Sargon*, 2 Keen, 255.

(*y*) 1 Vict. c. 26; Story, 1171;

Tuffnell v. Page, 2 Atk. 37; *Sayer v. S.*, 7 Ha. 377; *Innes v. Sayer*, 3 Mac. & G. 606.

(*z*) *Hobson v. Blackburn*, 1 Keen, 273; *Robinson v. Gov. of London Hosp.*, 10 Ha. 19.

V. *Classification of Trusts.*

The leading division of trusts adopted by Mr. Lewin (*a*) distinguishes between those trusts which are created by the act of a party, and those which arise from the operation of law. This classification recommends itself in that it not only calls attention to the very prominent distinction between the different kinds of trusts as regards their creation, but also in that it coincides with an equally prominent distinction in the nature of the trusts themselves. It therefore has all the merit that can be looked for in a classification.

The first species of trusts may be concisely described as express trusts. Trusts which arise from the operation of law are of two kinds, Resulting Trusts and Constructive Trusts. In certain cases, from the manner of a party's dealing with his property, equity presumes an intention on his part to sever the legal and equitable interest by creating a trust. Such trusts are Resulting Trusts. In other cases, without any reference to the expressed or presumed intention of the parties, equity will, in order to satisfy the demands of justice and good conscience, assume the severance of the legal and equitable interests, and create a trust. Such trusts are Constructive Trusts.

These three several species of trusts will naturally yield to further analysis as they are separately considered.

It may be well here to state that the trusts above described as Resulting Trusts are by some writers designated Implied Trusts (*b*). The nomenclature here employed is that of Mr. Lewin, by whom the term "implied trusts" is used to describe a sub-division of express trusts, namely those trusts which are created by the use of informal precatory expressions.

(*a*) 7th ed., p. 21.

(*b*) Snell's Principles of Equity.

SECTION II.—EXPRESS TRUSTS.

- I. *The Creation of the Trust.*
- II. *Distinction between Executed and Executory Trusts.*

Glenorchy v. Bosville.

- III. *Voluntary Conveyances and Trusts.*

- A. *Gifts.*
- B. *Unexecuted intentions to give.*
- C. *Voluntary Trusts.*
- Ellison v. Ellison.
- D. *Statutory Modifications.*
- E. *Trusts for Payment of Debts.*

I. *The Creation of the Trust.*

As a general rule, any person who is competent to deal with the legal estate may vest it in a trustee for the purpose of executing his intention.

Statute of Frauds. 29 Car. II. c. 3. 1. Before the Statute of Frauds, trusts of every species of property might have been created or transferred by parol; but by that statute (c) it was enacted,

s. 7. “That all declarations or creations of trusts or confidences of any lands, tenements or hereditaments, shall be manifested or proved by some writing signed by the party who is by law enabled to declare such trusts, or by his last will in writing” (d).

s. 9. “That all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by his last will” (e).

(c) 29 Car. II. c. 3.
(d) s. 7.

(e) s. 9.

"Provided always, that where any conveyance shall be s. 8. made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law . . . such trust or confidence shall have the like force and effect as . . . if this statute had not been made" (*f*).

Thus a trust of freeholds, or of copyholds or of leaseholds, can no longer be created or transferred without a written instrument. But a trust of personal chattels may still be generally created by parol; and resulting and constructive trusts are unaffected by the Act. Scope of the statute.

These rules are applicable whatever be the object of the trust, whether it be of a private or public or charitable nature (*g*).

It is to be observed that the statute does not require more than that the trusts within its purview shall be manifested and proved by writing. It is satisfied by written evidence of a trust which may not necessarily have been originally declared in writing (*h*). It is necessary, however, that in such cases the evidence should clearly be shown to relate to the subject of the alleged trust (*i*); and not only the fact of the trust, but also the terms of it, must be supported by evidence under signature (*k*). Requires only evidence in writing.

2. No particular form of expression is necessary to the creation of a trust, if, on the whole, it can be gathered that a trust was intended. "As a general rule, when property is given absolutely to any person, and the same person is by the giver, who has power to command, recommended or entreated, or wished to dispose of that property in favour of another, the recommendation, entreaty or wish shall be held to create a trust, first, if the words are so used that on the whole they ought to be construed as imperative; Formal expressions not required.

(*f*) s. 8.

(*g*) *Loyd v. Spillet*, 3 P. Wms. 344; 2 Atk. 148.

(*h*) *Forster v. Hale*, 3 Ves. 696; *Moorcroft v. Dowding*, 2 P. Wms.

314.

(*i*) *Forster v. Hale*, *sup.*

(*k*) *Ibid.*; *Smith v. Matthews*, 3 De G. F. & J. 139; *Kronheim v. Johnson*, 7 Ch. D. 60.

secondly, if the subject of the recommendation or wish be certain; thirdly, if the objects or persons intended to have the benefit of the recommendation or wish be also certain" (*l*).

Words
must be
imperative.
Illustrations.

(*l*.) *The words must be imperative.*

Tendency
of the
Court.

As illustrating what expressions are deemed to be sufficiently imperative, we find that the words "wish and request" (*m*), "have fullest confidence" (*n*), "heartily beseech" (*o*), "well know" (*p*), "of course he will give" (*q*), have been so considered. But the leaning of the Court is against construing merely precatory or recommendatory words as creating trusts. Thus, if such expressions as the above are accompanied by other words which indicate an intention that the first taker should have a discretionary power over the subject, or that the donor did not intend the wish to be imperative, no trust will be created (*r*). The tendency of modern decisions is still more pronounced in this direction, and such cases as *Bardswell v. B.* and *Robinson v. Smith* would very probably not now be followed (*s*).

Moreover, clear words of gift to a devisee for his own benefit, free from control, will not be cut down by subsequent words which amount to an expression of desire (*t*).

Secret
trust enforced on
ground of
fraud.

A person apparently taking property by devise or bequest from a testator, with the knowledge of the existence of another instrument, which he actually or impliedly undertakes to carry into effect, will be fixed as a trustee with the performance of the directions given in such instrument, when the Court is satisfied that he has fraudulently induced the testator to confide to him the duty which he

(*l*) *Per* Lord Langdale, *Knight v. K.*, 3 Beav. 148, 172; 11 Cl. & F. 513.

(*m*) *Godfrey v. G.*, 11 W. R. 554.

(*n*) *Shorlton v. S.*, 32 Beav. 143.

(*o*) *Meredith v. Heneage*, 1 Sim. 542, 553.

(*p*) *Bardswell v. B.*, 9 Sim. 319.

(*q*) *Robinson v. Smith*, 6 Mad. 194.

(*r*) *Howorth v. Dewell*, 29 Beav. 18; *Benson v. Whittam*, 5 Sim. 22.

(*s*) *Lambe v. Eames*, 10 Eq. 267; *Hutchinson v. Tenant*, 8 Ch. D. 540; *Parnall v. P.*, 9 Ch. D. 96.

(*t*) *Meredith v. Heneage*, *sup.*; *White v. Briggs*, 15 Sim. 33.

undertook to perform (*u*). In such cases the existence of fraud induces a departure from the usual rule against allowing any force to a document of a testamentary nature not properly executed. In other words, fraud creates a right to the discovery of secret trusts, notwithstanding the Wills Act (*x*), and such trusts may be proved by parol evidence (*y*).

If, however, a secret trust of such a nature arises from a bargain which designs to contravene the policy of the law, for instance, in attempted circumvention of the Mortmain Acts, the trust will be set aside in favour of the heir (*z*).

(2.) *The subject-matter must be certain.*

Thus where a testator devised real property to his wife to be sold for the payment of his debts and legacies in aid of his personal estate, and added that he "did not doubt but his wife would be kind to his children," no trust was created, because no right to any particular part of the estate was conferred (*a*). So in a similar case where the words used were "not doubting, as she has no relations of her own, but that she will consider my near relations should she survive me, as I should consider them myself should I survive her," the result was the same (*b*). Similarly the expressions "well knowing he will remember" certain objects (*c*), "do justice to," or "deal justly and properly with" (*d*), or a recommendation to give "what shall be left at his death" (*e*), or "what he may have saved" (*f*), are considered too indefinite to create a trust (*g*).

(3.) *The objects or cestuis que trust must be certain.*

In *Harland v. Trigg* (*h*), where a testator gave leaseholds to his "brother for ever, hoping he will continue

Illegal
secret
trust.

Subject
must be
certain.

Illustra-
tions.

Objects
must be
certain.

(*u*) Godefroi on Trusts, p. 79;
McCormick v. Grogan, 4 L. R. H. L.
82.

(*x*) *Thynn v. T.*, 1 Vern. 295;
Norris v. Frazer, 15 Eq. 318, 330.

(*y*) *Edwards v. Pike*, 1 Ed. 267.

(*z*) *Muckleston v. Brown*, 6 Ves. 69.

(*a*) *Buggins v. Yates*, 9 Mod. 122.

(*b*) *Sale v. Moore*, 1 Sim. 534.

(*c*) *Bardswell v. B.*, *sup.*

(*d*) *Pope v. P.*, 10 Sim. 1.

(*e*) *Wynne v. Hawkins*, 1 Bro. C. C.
179.

(*f*) *Cowman v. Harrison*, 10 Ha.
234.

(*g*) See also *Eade v. E.*, 5 Madd.
118; *Finden v. Stephens*, 2 Ph. 142;
Horwood v. West, 1 S. & S. 387;
Shaw v. Lawless, 5 Cl. & F. 129.

(*h*) 1 Bro. C. C. 141.

them in the family," Lord Thurlow held that no trust was created, and said: "I take the rule of law to be this, that two things must concur to constitute these devises,—the terms and the object. *Hoping* is in contradistinction to a direct devise; but whenever there are annexed to such words precise and direct objects the law has connected the whole together, and held the words sufficient to raise a trust;—but then the objects must be distinct." Similarly the expression "near relations" (*i*) has been considered too indefinite to create a trust.

Distinction where trust is manifestly intended.

The distinction must, however, be carefully observed between those cases in which, as above, it was held that no trust was created, and therefore the legatee might hold the estate or bequest beneficially, and other cases in which, though the terms are not sufficiently certain and definite to create an effectual trust, it is, nevertheless, the manifest intention of the testator that there shall be a trust of some kind, and that the donee shall not take beneficially. It is an unfailing principle that if a trust is clearly intended, the intended trustee cannot take beneficially. In *Briggs v. Penny* (*k*), Lord Truro said: "If a testator gives upon trust, though he never adds a syllable to denote the objects of that trust, or though he declares the trust in such a way as not to exhaust the property, or though he declares it imperfectly, or though the trusts are illegal, still, in all these cases, as is well known, the legatee is excluded, and the next of kin" or the heir "takes." In *Stead v. Mellor* (*l*) it was intimated that the precise words used in *Briggs v. Penny* were barely sufficient to indicate a clear intention to create a trust, but the principle above quoted was not questioned.

Then trustee cannot take beneficially.

(4.) *The object of the trust must be lawful.*

Object must be lawful.

The Court will not permit the system of trusts to be directed to any object that contravenes the policy of the law. Thus a trust of personalty cannot be limited to A.

(i) *Salé v. Moore*, 1 Sim. 534.

& G. 546.

(k) 3 De G. & Sm. 525; 3 Mac.

(l) 5 Ch. D. 225.

and his heirs, nor can it be entailed. If such words are used, they will vest an absolute interest in A. (*m*).

Similarly, trusts which contravene the Mortmain Acts, Mortmain Acts, &c. whether openly or secretly (*n*), or the law of perpetuities (*o*), or the policy of the law of bankruptcy (*p*), are void. Nor can property be settled on trust for illegitimate children to be thereafter born (*q*), nor on any trust adverse to religion or morality (*r*) or which savours of simony (*s*).

Where a trust is created for an unlawful or fraudulent purpose, the Court will neither enforce the trust in favour of the parties intended to be benefitted, nor will assist the settlor to recover the estate (*t*). But if the object be partly lawful and partly unlawful, and the Court can sever the two, it will hold good and execute the lawful part (*u*). Court will neither assist cestui que trust nor author of the trust.

3. *Power in the nature of a trust.*

In addition to the cases in which upon words of recommendation a trust simply has been held to be created, there is another class of cases in which powers are given to persons accompanied with such words of recommendation in favour of certain objects, as to confer upon them the nature of trusts; so that if the donees fail to exercise such powers in favour of the specified objects, the Court will take upon itself to a certain extent the duties of the donees. Power in nature of a trust. Executed by the Court.

In order to induce the Court so to do there must be something more than a mere power of disposing (*v*); but When. if there appears, in connexion with the words creating the power, a general intention in favour of a class, and a particular intention in favour of individuals of that class to be selected by another person, and the particular intention

(*m*) *Duke of Norfolk's Ca.*, 3 Ch. Ca. 9; 1 Vern. 164.

(*n*) *Way v. East*, 2 Drew. 44.

(*o*) *D. of Norfolk's Ca.*, *supra*.

(*p*) *Graves v. Dolphin*, 1 Sim. 66;

Higinbotham v. Holme, 19 Ves. 88.

(*q*) *Medworth v. Pope*, 27 Beav. 71.

(*r*) *Thornton v. Howe*, 31 Beav. 14.

(*s*) *Cowper v. Mantell*, 22 Beav. 231.

(*t*) *Cottington v. Fletcher*, 2 Atk. 155; *Haigh v. Kaye*, 7 Ch. 473.

(*u*) *Mitford v. Reynolds*, 1 Ph. 185; *Re Birkett*, 9 Ch. D. 576.

(*v*) *Brown v. Higgs*, 8 Ves. 561, 570.

fails from that selection not being made, the Court will carry into effect the general intention (*x*). In such a case the power is so given as to make it the duty of the donee to execute it, and the Court will not allow the objects to suffer from his negligence (*y*).

Further, if in such a case a rule is laid down for the guidance of the donees of the power, which they do not act upon, the Court will act upon it, exercising the same judgment as the trustees should have done (*z*). There the trustees were to give the residue of the property to the testator's friends and relations where they should see most necessity, and as they should see most equitable and just. On the surviving trustee refusing to act, the Court considered that it could follow the rule indicated and judge of the necessity. In the absence of such guidance, the Court would distribute the fund equally among the objects of the trust (*a*) on the principle that equality is equity. The same principle was followed in *Salisbury v. Denton* (*b*), where a widow was directed to apply on her death part of a fund for a charity, the remainder to be at her disposal among the testator's relations in such proportions as she might be pleased to direct.

Distinction where there is no express gift to a class.

There is a distinction which should be noticed between those cases in which there is a gift to a class with a subsequent power of appointment amongst the class, and those in which there is no gift to the class except in or by means of the power. In the first instance, the property vests until the power is exercised in all the members of the class, and in default of appointment they will all take (*c*). The property is, in other words, vested in the whole class, subject to be divested by the exercise of the power. But in the second case, there being no such primary gift to the class, those only can take in default of appointment who

(*x*) *Burrough v. Philcox*, 5 My. & Cr. 72.

(*y*) *Brown v. Higgs*, 8 Ves. 576; 5 My. & Cr. 92.

(*z*) *Gower v. Mainwaring*, 2 Ves.

sr. 87.

(*a*) *Doyley v. Att.-Gen.*, 2 Eq. Ca. Ab. 194.

(*b*) 3 K. & J. 529.

(*c*) *Lambert v. Thwaites*, 2 Eq. 151.

might have taken under an exercise of the power. Thus the children of a deceased object of the power would not take in default of appointment (*d*).

There is, again, a distinction between those cases in which the donee of the power has a life interest in the fund, and those in which he has not. If he has, the class to take in default of appointment is determined by the state of facts at the death of the donee of the power (*e*). If he has not, it will be determined by the state of facts at the death of the donor of the power (*f*).

Time of ascertain-
ing class
depends on
whether
donee
has a life
interest or
not.

II. *Executed and Executory Trusts.*

One of the most important of the sub-classifications of express trusts is that which distinguishes between executed and executory trusts. On this subject the leading authority is the case of

Distinction be-
tween
executed
and exe-
cutory
trusts.

GLENORCHY v. BOSVILLE.

[Ca. t. Talb. 3; 1 W. & T. L. C. 1.]

In this case A. devised real estate to his sisters B. and C. their heirs and assigns upon trust until his granddaughter D. should marry or die to receive the profits, and thereout to pay her £100 a year for her maintenance; the residue to pay debts and legacies, and after payment thereof in trust for the said D.; and upon further trust, that if she lived to marry a Protestant of the Church of England, and at the time of such marriage were of the age of 21 or upwards, or, if under that age, such marriage were with the consent of the said B., then to convey the said estate with all convenient speed after such marriage to the use of the said D. for life, without impeachment of waste, remainder to her husband for life, remainder to the issue of her body, remainders over. It was held that though D. would have

(*d*) *Walsh v. Wallinger*, 2 Russ. & My. 78.

(*e*) *Harding v. Glyn*, 1 Atk. 469.

(*f*) *Cole v. Wade*, 16 Ves. 27.

taken an estate tail had it been the case of an immediate devise, yet that the trust being executory was to be executed in a more careful and accurate manner; and that a conveyance to D. for life, remainder to their first and every other son, with remainder to the daughters, would best serve the testator's intent.

This case is the foundation of a long series of decisions in which the distinction between *executed* and *executory* trusts is recognised.

Definition
of executed
trust.

A trust is said to be *executed* when no further act is required to give effect to it, the terms of the trust being completely declared by the instrument creating it; as where an estate is conveyed or devised unto and to the use of A. and his heirs in trust for B. and the heirs of his body.

Executory
trust.

A trust is said to be *executory* when some further act must be done by the author of the trust or by the trustees to give effect to it, as in the case of marriage articles, which require a settlement to follow to declare fully the limitations of the trust, or as in the case of a will by which property is devised to trustees upon trust to settle or convey in a more perfect and accurate manner.

The distinction between an executed and an executory trust does not rest merely on the fact that the trustee may be required to execute some further instrument to give full effect to his trust. For instance, a mere direction to convey upon certain specified trusts will not render those trusts executory, so as to give to a Court of equity the latitude of construction which we shall see to be applicable in the case of executory trusts. The true distinction depends on the question whether the creator of the trust has been what is called his own conveyancer; whether, that is to say, he has so defined his intention that you have nothing to do but to take the limitations he has given you, and convert them into legal estates, or has left it to the Court to make out from general expressions what his intention is (*g*).

(*g*) *Egerton v. Brownlow*, 4 H. L. 1, 210.

It is clearly established that in the case of executed trusts a Court of equity will construe technical words in the same manner as a Court of law would construe them when applied to legal estates. If, for instance, an estate is vested in trustees and their heirs in trust for A. for life without impeachment of waste, with remainder to trustees to preserve contingent remainders, with remainder in trust for the heirs of A.'s body, the trust being executed, A. will, according to the rule in *Shelley's case*, take an equitable estate tail, just as he would have taken a legal estate tail in case similar words of limitation had been used in a conveyance direct to himself without the intervention of trustees (*h*).

Construction of executed trusts: equity follows the law.

In cases, however, of executory trusts where something is left to be done—viz., the trusts are left to be executed in a more careful and more accurate manner—a Court of equity does not consider itself bound to construe technical expressions with the same legal strictness. If, from the nature of the instrument or from the circumstances of the case, the intention of the creator of the trust can be ascertained, the Court will, in supplying or directing the further act necessary for the execution of the trusts, mould the trusts according to such intention.

Construction of executory trusts depends on the instrument creating them.

The effects of the distinction between executed and executory trusts are most conspicuous in two classes of cases: 1. Those arising under marriage articles. 2. Those arising under wills. It is sometimes represented that these two classes of cases are treated on different principles. This is not strictly true. The principle in both cases is that the executory trusts are to be carried into execution in accordance with the intention of the creator of the trust. The difference between the two cases is that marriage articles from their very nature afford an indication of that intention, which is wanting in the case of a will. In the former the presumed object of

The principle is the same in wills as in articles:

viz., to follow the testator's intention;

but in articles the intention may be inferred.

(*h*) *Wright v. Pearson*, 1 Eden, 119; *Austen v. Taylor*, *ibid.* 361.

Secus in
wills.

the instrument is to make provision for the issue of the marriage; in the latter there is no reason to suppose that a testator intends his beneficiary to take one quantum of interest rather than another, an estate for life rather than an estate in tail or in fee (*i*). If, however, even in the case of a will, it can be ascertained from the language employed that the testator did not mean to use the expressions he has employed in their strict technical sense, the Court in decreeing such settlement as he has directed, that is, in executing the executory trust, will depart from his words in order to execute his intention (*j*). The precise nature of the contrast between the two cases will fully appear in the detailed separate consideration of executory trusts under marriage articles and those arising under wills.

A. *Executory trusts under marriage articles.*

Construc-
tion of
articles.
Real
estate.

(1.) If, in articles before marriage, for making a settlement of the real estate of either the intended husband or wife, it is agreed that the same shall be settled upon the heirs of the body of them or either of them, in such terms as would, if construed with legal strictness according to the rule in *Shelley's case*, give either of them an estate tail, and so enable him or her to defeat the provision for the issue by barring the entail, Courts of equity, considering that the special object of the articles is to make provision for the issue of the marriage, will in conformity with the presumed intention of the parties, decree a settlement to be made upon the husband or wife for life only, with remainder to the issue of the marriage in tail as purchasers (*k*). When the words "heirs of the body," or "issue," are held to indicate an intention that the issue of the marriage should take as purchasers, a settlement will be decreed in favour of daughters as well

Issue
treated
as pur-
chasers.

(*i*) *Rochford v. Fitzmaurice*, 2 Dr. B. 369.
& W. 1.

(*k*) *Trevor v. T.*, 1 P. Wms. 622;
(*j*) *Blackburn v. Stables*, 2 V. & *Streetfield v. S.*, ca. t. Talb. 176.

as sons ; thus the form of the limitation will be to the first and other sons successively in tail, with remainder to the daughters as tenants in common, with cross remainders between them (*l*). Form of limitation.

Though the principle on which the Courts act in these cases is to make such provision for the issue of the marriage as it shall not be in the power of either parent to defeat, where articles are so framed that the concurrence of *both* parents is requisite in order to defeat the provision for the issue, the Court has refused to interfere, considering that it may have been the intention of the parties to the articles that the husband and wife should *jointly* have such power. And so, where it appears on the face of the articles that the parties themselves knew and made a distinction between limitations in strict settlement, and limitations leaving it in the power of *one* of the parents to bar the issue, a strict settlement of the whole will not be decreed (*m*). Modifying circumstances.

Where words are used in articles which would, if interpreted strictly, create a joint tenancy among the children of the marriage, equity will decree a settlement upon them as tenants in common, either with provisions for limiting over the shares of any who die under age and without issue (*n*), or for making the interests of the children contingent on their attaining 21, being sons, or being daughters, attaining that age or marrying (*o*). But surrounding circumstances may modify the operation of this rule (*p*). Tenancy in common preferred to joint tenancy.

The same rules of construction apply generally to post-nuptial as to ante-nuptial settlements (*q*). Same rules apply to post-nuptial settlements.

(2.) Where chattels are settled immediately or by a trust executed, upon the same trusts that have been declared of

(*l*) *Nandick v. Wilkes*, Gilb. Eq. 445 ; *Cogan v. Duffield*, 2 Ch. D. Rep. 114. 44, 50.

(*m*) *Hovel v. H.*, 2 Ves. sr. 358, (*p*) *In re Bellasis' Trust*, 12 Eq. 359. 218.

(*n*) *Taggart v. T.*, 1 S. & L. 84, 89. (*q*) *Rochford v. Fitzmaurice*, 2 Dr.

(*o*) *Young v. Macintosh*, 13 Sim. & W. 1, 19.

Person-
alty:

real estate in strict settlement, that is, on the first and other sons successively in tail, if there is no restriction as to the attainment of 21 years or the fulfilment of any other condition, such chattels will vest absolutely in the first tenant in tail at his birth, whether the limitation of the chattels be expressed *in extenso* or created by reference to the limitations of the realty (r). But in the case of an executory trust by settlement, as where a person has *agreed or covenanted to settle* chattels upon similar trusts to real estate in strict settlement, a Court of equity, upon the principle of carrying into effect the intention of the parties as far as possible, will order a clause to be inserted in the settlement of the chattels to the effect that the tenant in tail shall not be entitled to the absolute property in the chattels unless he shall attain the age of 21 years or die under that age leaving issue (s).

Absolute
interest
postponed
till attain-
ing

twenty-
one years.

Declara-
tion in
place of
settle-
ment.

Though a settlement ought to be executed in order to carry the executory provisions of marriage articles into effect, the Court has, where the property was personal, at the request of the parties, in order to save expense, made a declaration as to the true meaning of the articles, upon which the parties were able to act, without needing a formal instrument to be prepared and executed (t).

B. *As to executory trusts in wills.*

(1.) *As to real property.*

In wills
realty
construed
as at law,
unless con-
trary in-
tention
apparent.

Unless the intention of the testator appears from the will itself that he meant the words "heirs of the body," or words of similar import, to be words of purchase, Courts of equity will direct a settlement to be made according to the strict legal construction of those words; but if such an intention is apparent on the face of the will, the Court will give effect to it. The principles involved cannot be better illustrated than by comparing the cases of *Sweetapple v.*

(r) *Doncaster v. D.*, 3 K. & J. 26. *coln*, 3 Ves. 387.

(t) *Byam v. B.*, 19 Beav. 58.

(s) *D. of Newcastle v. C. of Lin-*

Bindon (u), and *Papillon v. Voice (v)*. In the former, B. ^{What amounts to indication of contrary intention.} gave by will £300 to her daughter Mary to be laid out by her executrix in lands, and settled to the only use of her daughter Mary and her children, and if she died without issue, the land to be equally divided between her brothers and sisters then living. Lord Cowper said that had it been an immediate devise of land, Mary, the daughter, would have been by the words of the will tenant in tail: and in the case of a voluntary devise, the Court must take it as they found it, and not lessen the estate or benefit of the legatee; although upon the like words in marriage articles it might be otherwise. Here there was an executory trust indeed, inasmuch as the executrix was required to execute a settlement to give effect to the testatrix's intention; but, occurring in a will, which conferred a benefit voluntarily on Mary, there was nothing to lead one to suppose that a lesser quantum of interest rather than a greater was intended to be conferred: therefore the Court had no ground for attributing to the words used any other than their strict legal meaning (x). In *Papillon v. Voice*, A. bequeathed a sum of money to trustees in trust to be laid out in a purchase of lands and *to be settled* on B. for life, without impeachment of waste, remainder to trustees and their heirs during the life of B. to preserve contingent remainders, remainder to the heirs of the body of B., remainder over, with power to B. to make a jointure; and by the same will A. *devised lands* to B. for his life, without impeachment of waste, remainder to trustees and their heirs during the life of B. to support contingent remainders, remainder to the heirs of the body of B., remainder over. Lord Chancellor King declared as to that part of the case where lands were devised to B. for life, though said to be without impeachment of waste, with remainder to trustees to support contingent remainders, remainder to the heirs of the body of B., this last remainder was within the

(u) 2 Vern. 536.
(v) 2 P. Wms. 471.

(x) *Seale v. S.*, 1 P. Wms. 290.

general rule, and must operate as words of limitation, and consequently create a vested estate tail in B.; but as to the other point, he declared the Court had a power over the money directed by the will to be invested in land, and that the diversity was where the will passed a legal estate, and where it was only executory, and the party must come to the Court in order to have the benefit of the will; that in the latter case the intention, and not the rules of law must be followed; so that as to the lands to be purchased, they should be limited to B. for life, with power to B. to make a jointure, remainder to trustees during his life to preserve contingent remainders, remainder to his first and every other son in tail male successively, remainder over. It will be observed that the great distinction between this case and *Sweetapple v. Bindon* lay in the fact that here the testator had divided his lands with which he intended to benefit B. into two parcels, one of which he devised to B. on certain limitations which were construed legally to carry an estate tail, and the other of which he directed to be settled on B. on the same limitations. This division afforded an index to the testator's intention, for there could have been no object in it if the limitations of both parcels were to be interpreted in the same way. There was here, therefore, an indication of intention which was lacking in *Sweetapple v. Bindon*; and therefore the executory trust was interpreted, not strictly, as in that case, but in a manner similar to that in which it would have been treated had it occurred in marriage articles.

Particular
expres-
sions.

There are many ways in which a testator may so indicate his intention as to lead the Court in construing an executory trust to depart from the strict legal signification of the words he employs; for instance, by instructing trustees to take "special care in such settlement that it shall not be in the power of A. to dock the entail of the estate given to him during his life" (y), or by directing that

(y) *Leonard v. E. of Sussex*, 2 Vern. 526.

the heirs of the body or issue shall take "in succession or priority of birth," or that the settlement shall be made "as counsel shall advise," or "as executors shall think fit" (z); or again, "in such manner and form as that if A. should happen to die without leaving lawful issue, then that the property might descend after his death unincumbered" (a); so where a testator directed a conveyance to his daughter for her life, and so as she alone, or such person as she should appoint, should take the rents and profits, and so that her husband should not intermeddle therewith, and from and after her decease in trust for the heirs of her body for ever, Lord Hardwicke considered that as there was a plain intention to exclude the husband from all benefit present or future interest, the words "heirs of her body" should be construed as words of purchase, and that the wife was entitled to a life estate only; because otherwise if the wife predeceased her husband, he would get a considerable benefit contrary to the testator's intention, as tenant by the curtesy (b). It requires, however, a stronger case to lead the Court to this interpretation when the word "heirs" is used than it does when "issue" is the term employed, the word "heirs" being naturally a word of limitation (c). And where the trusts and limitations of land to be settled are expressly declared by the testator, the Court has no authority to make them different from what they would be at law (d).

In wills, as in marriage articles, when the words "heirs of the body" or "issue" are construed as words of purchase, they will be held to include daughters as well as sons, and the settlement will be decreed to be made in default of sons and their issue upon daughters as tenants in common in tail general, with cross remainders between them (e); and although, in the ordinary construction of a gift by will to

"Heirs" is a stronger word in favour of a legal construction than issue.

Daughters favoured equally with sons.

Children succeed to parents,

(z) *White v. Carter*, 2 Eden, 366; *Bastard v. Proby*, 2 Cox, 6.

(a) *Thompson v. Fisher*, 10 Eq. 207.

(b) *Roberts v. Dixwell*, 1 Atk. 607.

(c) *Meure v. M.*, 2 Atk. 265.

(d) *Austen v. T aylor*, 1 Eden, 361.

(e) *Bastard v. Proby*, *sup.*; *Trevor v. T.*, 13 Sim. 108; 1 H. L. 239.

rather
than take
as joint
tenants.

a wife and children, they would take as joint tenants (*f*), where there has been a direction to secure the fund for the benefit of the wife and children, the Court has inferred an intention that the fund should be settled in the usual manner upon the wife for life, remainder to her children (*g*).

Where in a *will* there are directions for a settlement in terms which are ordinarily construed to create a joint tenancy, the Court has no authority, as in the case of marriage articles, to vary them in execution by giving a tenancy in common in the settlement unless there is something to indicate that such was the intention (*h*).

(2.) As to personalty.

Personalty
usually
vests
absolutely
at birth.

Where chattels are given by will, and directed to go by reference to limitations of real estate in strict settlement or as heirlooms, either simply or "as far as the rules of law and equity will permit," Courts of equity will not, even though the legal estate be in executors, construe the trusts of the will as executory, so as to prevent the chattels vesting absolutely in the first tenant in tail upon his birth, as we have seen would be done in the case of marriage articles (*i*). But if a plain intention be expressed that no person shall take the chattels absolutely who does not live to become entitled to the possession of the real estate, the Court will execute that intention (*k*); and then the execution of a disentailing deed of the real estate by a tenant in tail who does not live to become entitled to the chattels, will not prevent their vesting in the person who would have been entitled to the real estate in possession, if such disentailing deed had not been executed (*l*).

Contrary
intention
followed if
expressed.

C. The doctrine of *cy-pres*.

Execution
cy-pres.

Where an executory trust in articles or in a will if carried literally into effect would be void for illegality, as

(*f*) *Newell v. N.*, 7 Ch. 253, 256.

(*g*) *Combe v. Hughes*, 14 Eq. 415.

(*h*) *Marryat v. Townly*, 1 Ves. sr.

102; *Syngge v. Hales*, 2 Ba. & Be. 499.

(*i*) *Foley v. Burnell*, 1 Bro. C. C.

274; *Harrington v. H.*, 5 L. R. H. L. 87.

(*k*) *Potts v. P.*, 1 H. L. 671.

(*l*) *Hogg v. Jones*, 32 Beav. 45;

Shelley v. S., 6 Eq. 540.

by infringing the rule against perpetuities, the Court will, in order to carry the testator's intention into effect as far as possible, apply the principle of *cy-pres*, and direct a settlement to be made as strictly as the law will permit (*m*).

III. *Voluntary Conveyances and Trusts.*

The questions which arise in connexion with gifts, conveyances and declarations of trust which are unsupported by consideration, are so numerous and so important as to require separate and careful investigation.

One of the most important questions which require attention in this connexion is the distinction between a gift, an intention to give which is not completely carried into effect, and the creation of a voluntary trust.

A. First, what is necessary to constitute a complete gift, or *donatio inter vivos*?

1. In order to effect a gift of lands, it is necessary that the transfer should be effected by deed. A feoffment (unless made under a custom by an infant) is void without this evidence (*n*).

2. As to a gift of chattels, the best opinion seems to be that it must either be perfected by delivery, or evidenced by deed (*o*). A mere verbal gift of a chattel to a person in whose possession it already is has been held not to pass any property therein (*p*). There are, however, cases in which it has been considered sufficient to complete the gift that the conduct of the parties evidences a change of ownership (*q*). Where such a gift is evidenced by deed without delivery, it is complete unless and until disclaimer by the donee (*r*), which may be by parol.

(*m*) *Humberston v. H.*, 1 P. Wms. 332; and see *Hampton v. Holman*, 5 Ch. D. 183.

(*n*) 8 & 9 Vict. c. 106, s. 3.

(*o*) *Irons v. Smallpiece*, 2 B. & Ald. 551, 552.

(*p*) *Shower v. Pilck*, 4 Exch. 473.

(*q*) *Flory v. Denny*, 7 Exch. 583; *Ward v. Audland*, 16 M. & W. 862.

(*r*) *Siggers v. Evans*, 5 E. & B. 367.

Distinction between gifts, unexecuted, intentions to give, and voluntary trusts
Gifts—of land

of chattels,

of securities.

3. The delivery by the donor to the donee of securities transferable by delivery, with words of gift, and an intention on both sides to pass the property, constitutes a valid donation (s).

Between husband and wife.

4. A gift of chattels may be made by a husband to his wife without the intervention of a trustee, but in order to establish an allegation of such a gift there must be clear and distinct evidence corroborative of the wife's testimony (t); but the tendency of the Court is to regard slight circumstances as sufficient corroboration of the wife's claim where money which was originally her separate estate has come into her husband's power (u).

Unexecuted intentions to give.

B. *Unexecuted intentions to give.*

There is a marked and important distinction between that class of cases in which a settlor without consideration creates a trust in favour of others, and those in which he has ineffectually attempted by an imperfect gift to confer his whole interest upon volunteers.

Mere promise not enforced.

1. It is clear that a mere expression of intention to divide property with, or to leave it to others, or a mere promise to give, will not be enforced (x).

Clear evidence of intention to give will not create a trust.

2. But where the donor has gone farther than that, and has actually taken some steps with a design of transferring his property, which steps are, however, ineffectual at law for that purpose, the question has arisen whether equity ought not in such circumstances to come to the assistance of the intended beneficiaries, and to give effect to the imperfect legal assignment by treating it as creating a trust of the property in their favour. This question has given rise to a great number of cases which it is not always easy to reconcile, but the general result seems to be that the most clear intention to confer a direct interest will not be sufficient to create a trust in favour of a volunteer.

(s) *McCulloch v. Bland*, 2 Giff. 428; *Bromley v. Brunton*, 6 Eq. 275;

Hill v. Wilson, 8 Ch. 888.

(t) *Grant v. G.*, 34 Beav. 623.

(u) *Rowe v. R.*, 2 De G. & S. 294.

(x) *Dipple v. Corles*, 11 Ha. 183
Lister v. Hodgson, 4 Eq. 30.

Thus where a person endorsed upon the receipt for one of the subscriptions in the F. & C. Navigation Company, —“I hereby assign to my daughter B. all my right, title and interest of and in the enclosed call, and all other calls in the F. & C. Navigation Company,” but never parted with the paper, the Court refused to hold that a trust was created. He might have assigned the property if he chose, but he did not; and there was no power to compel him to do so. His act amounted to some evidence of intention to transfer the property, but there was a *locus penitentiae* as long as the act was incomplete (*y*). Illustrations.

So where the obligee of a bond signed a memorandum not under seal, which was indorsed upon the bond, and purported to be an assignment thereof without consideration to a person to whom at the same time the bond was delivered, it was held that the gift being not complete, the Court could not give effect to it as a trust (*z*).

There are indeed some cases which seem to be inconsistent with the above rule, and which indicate an inclination to hold that to amount to a declaration of trust which according to ordinary rules of construction would amount only to an imperfect assignment (*a*). But the more recent and emphatic decision in *Richards v. Delbridge* (*b*) follows the more powerful current of authorities, and thus expresses their principle,—“The true distinction seems to be plain and beyond dispute; for a man to make himself a trustee, there must be an expression of intention *to become a trustee*, whereas words of present gift show an intention to give over property to another, and not to retain it in the donor’s own hands for any purpose, fiduciary or otherwise” (*c*). There must be an intention to create a trust.

3. Where a voluntary instrument, although effecting no Where a

(*y*) *Antrobus v. Smith*, 12 Ves. 39; *Searle v. Law*, 15 Sim. 95.

(*z*) *Edwards v. Jones*, 1 My. & Cr. 226; *Dillon v. Coppin*, 4 *ibid.* 647.

(*a*) *Richardson v. R.*, 3 Eq. 686;

Morgan v. Malleon, 10 Eq. 475.

(*b*) 18 Eq. 11.

(*c*) See also *Milroy v. Lord*, 4 De G. F. & J. 274; *Breton v. Woolven*, 17 Ch. D. 416.

valid legal obligation created, equity will give effect to it. legal transfer of property, creates a valid legal obligation, equity will give effect to it (*d*). Thus where a person covenants, without consideration, to pay a sum of money, if the covenant is complete, and the Court is not called upon to do any act to make it perfect, it will give effect to a trust declared thereupon (*e*).

Imperfect testaments not aided. Where a paper is of a testamentary character, but invalid from want of proper execution, it cannot be enlarged or converted into a declaration of trust (*f*); and if a testator by will gives property upon trusts afterwards to be declared, he cannot make any valid declaration of such trusts, except by an instrument duly executed as a will or codicil. In the absence of such an instrument, the property would fall into residue (*g*).

C. *Voluntary trusts.*

Voluntary trusts. Where the plaintiff's claim rests not on the allegation of a gift, complete or incomplete, but of a trust created in his favour, it is clearly settled that where a trust is actually created, and the relation of *cestui que trust* established, a Court of equity will in favour of a volunteer enforce the execution of the trust against the person creating it and all subsequent volunteers; but it will not on behalf of volunteers interfere for the purpose of establishing the relationship of trustee and *cestui que trust* by creating a trust. The leading authority which expressly decides this point is

ELLISON v. ELLISON.

[6 Ves. 656; 1 W. & T. L. C. 273.]

The rule is sufficiently simple, but its application is often by no means free from difficulty, as it is frequently a question of much nicety to determine whether or not the relation of trustee and *cestui que trust* has been established.

(*d*) *Hall v. Palmer*, 3 Ha. 532;
Dawson v. Kearton, 3 Sm. & Giff.
186.

(*f*) *Warriner v. Rogers*, 16 Eq.
340, 353.

(*e*) *Clough v. Lambert*, 10 Sim. 174.

(*g*) *Johnson v. Ball*, 5 De G. &
Sm. 85.

It may be well, before considering in detail the cases which illustrate the principle, to remind the reader that voluntary trusts are, equally with others, within the purview of the Statute of Frauds. If lands are concerned, therefore, such trusts must by sect. 7 of that statute be evidenced by some writing; but a trust of pure personalty may be validly created by a parol declaration (*h*). In these cases, however, if doubt or difficulty arises respecting the words alleged to have been used, the Court may give weight to the suggestion that the words, not being committed to writing, may not express the deliberate sentiments of the party (*i*).

Voluntary trusts within Statute of Frauds.

2. There seems at first sight to be but a narrow distinction between some cases where equity has given effect to such voluntary trusts, and those cases which have been described as imperfect gifts, in which the Court would not interfere on behalf of the would-be beneficiaries.

Narrow distinction between these trusts, and imperfect gifts.

Thus in *Fortescue v. Barnett* (*k*), J. B. made a voluntary assignment by deed of a policy of assurance effected upon his own life to trustees upon certain trusts, and delivered the deed to one of the trustees. The grantor kept the policy in his own possession, and no notice of the assignment was given to the assurance office. It was held that an enforceable trust was created, since no act remained to be done by the grantor which, to assist a volunteer, the Court would not compel him to do. The facts and the result were similar in *Pearson v. Amicable Ass. Co.* (*l*). A comparison of these cases with *Edwards v. Jones* and *Richards v. Delbridge* (*m*) will show that while they agree in the fact that the action of the grantor was incomplete, they differ in the crucial fact that in the former the steps which were taken tended, though not complete, to the creation of a trust, while in the latter the intention

The true distinction.

(*h*) *McFadden v. Jenkyns*, 1 Ph. 153.

(*i*) *Dipple v. Corles*, 11 Ha. 183.

(*k*) 3 My. & K. 36.

(*l*) 27 Beav. 229; see also *Baddley v. B.*, 9 Ch. D. 113; *Sewell v. King*, 14 Ch. D. 179.

(*m*) *Supra*, p. 51.

evidenced did not point to a trust at all. The distinction is, in short, that already quoted from the judgment in *Richards v. Delbridge*.

Two ways
of creating
a volun-
tary trust.

3. There are two ways in which a settlor may deal with his property so as to create an irrevocable trust in favour of volunteers; and they are equally applicable, *mutatis mutandis*, whether his interest in the property is legal or merely equitable.

Transfer
of legal
interest
with trusts
declared.

(1.) *Ellison v. Ellison* establishes that where there has been an actual *bonâ fide* transfer of a legal interest upon trusts declared in favour of volunteers, these trusts will be enforced in equity. It goes further, and is a clear authority for the proposition that the enforcement of the trusts will not be prevented by the fact that the legal estate by accident gets back into the hands of the donor, to whom, if it were transferred by the trustees, they would be guilty of a breach of trust (*n*).

*Locus
penitentiae*
as long as
trusts are
not
declared.

As long, however, as the trusts have not been determined by the settlor, notwithstanding a transfer to trustees, he has a *locus penitentiae*, and may call for a re-transfer of the legal estate, there being no remedy for or equity in the would-be *cestui que trusts* until the declaration of the terms of the intended trust (*o*).

2. Com-
plete
assignment
of equit-
able
interest.

(2.) Similarly, if his estate be equitable, and he assigns his equitable interest without consideration, doing all that it is in his power to do to pass the property, the transaction is irrevocable. As to realty a contrary doctrine was indeed expressed in *Bridge v. B.* (*p*); but the subsequent case of *Gilbert v. Overton* (*q*), supported as it is by other authorities, among them the opinion of Lord St. Leonards (*r*), is to be regarded as of greater weight. As to personalty also, it was formerly held that an assignment under seal of that which did not pass at law by the opera-

(*n*) *M'Donnell v. Hesilrige*, 16 Beav. 346.

(*o*) *Re Sykes' Trusts*, 2 J. & H. 415.

(*p*) 16 Beav. 315, 327.

(*q*) 2 H. & M. 110, 117.

(*r*) Sugd. V. & P. 719, 14th ed.

tion of the assignment itself, unaccompanied by other acts, was no better than a covenant or agreement to assign, and was therefore not enforceable (*m*). But the case of *Keke-wich v. Manning* (*n*), speaking with the authority of the Lords Justices Knight-Bruce and Lord Cranworth, must be considered as in effect overruling it.

(3.) On the other hand, it is not necessary, in order to render a trust in favour of volunteers enforceable, that there should have been an actual transfer of the legal interest to trustees. It suffices if the settlor has constituted himself a trustee and declared the trusts (*o*).

3. Settlor constitutes himself trustee, and declares trusts.

(4.) And similarly, if the interest be equitable a valid trust may be created by the owner's direction to the trustees to hold the property in trust for the donee (*p*). Notice to the trustees in whom the legal estate is vested is necessary to protect the donee against third parties (*q*); but the trust is good as against the donor without it (*r*); nor is notice to the *cestui que trust* of the declaration of trust necessary (*s*).

4. Directing trustees to hold on certain trusts.

Notice only necessary as against third parties.

4. Although if a conveyance in favour of a volunteer be complete it will usually be executed by the Court, it will not be so if it arose from mistake (*t*) or fraud (*u*). On the contrary, in such cases it will usually be rescinded.

Mistake or fraud vitiates the transactions.

Again, Courts of equity will not only refuse to carry into effect a merely voluntary agreement, contract, or covenant to transfer property, by which the relation of trustee and *cestui que trust* is not fully constituted, but it will not be moved to assist a donee by the existence of a meritorious consideration only. Thus it will not enforce a voluntary agreement or covenant, or give effect to an

In absence of above elements, meritorious consideration not sufficient.

(*m*) *Meek v. Kettlewell*, 1 Ha. 464, 474.

(*n*) 1 De G. M. & G. 176.

(*o*) *Exp. Pye; Exp. Dubost*, 18 Ves. 140, 150.

(*p*) *Rycroft v. Christy*, 3 Beav. 238.

(*q*) *Donaldson v. D.*, Kay, 711.

(*r*) *Ibid.*

(*s*) *Tait v. Leithhead*, Kay, 658.

(*t*) *Manning v. Gill*, 13 Eq. 485.

(*u*) *Chesterfield v. Janssen*, 2 Ves. sr. 125.

imperfect gift, though designed as a provision for a wife or children after marriage (x).

Doctrine
affected by
statutes.

The main question to be decided in all the cases is that above quoted from the judgment in *Fortescue v. Barnett*, "whether any act remained to be done by the grantor which, to assist a volunteer, the Court would not compel him to do." And it should be remarked that this question is considerably affected by several recent statutes by which many kinds of property have been made assignable at law which formerly were not so: e.g., policies of life assurance by 30 & 31 Vict. c. 144, policies of marine assurance by 31 & 32 Vict. c. 86, debts and other legal choses in action by the Judicature Act, 1873, sect. 25, sub-s. 6. It may well happen under these statutes that an incomplete assignment will be refused support, which, previous thereto, might have obtained it on the ground that the grantor had done all that he could do at law to pass the property.

D. Statutory modifications.

Fraud on
creditors,
13 Eliz.
c. 5.

1. By 13 Eliz. c. 5, "all covinous conveyances, gifts, alienations of lands or goods, whereby creditors might be in any way disturbed, hindered, delayed, or defrauded of their just rights," are declared *utterly void*; but the Act is not to extend to any estate or interest in lands, &c., on good consideration, and *bonâ fide* conveyed to any person not having notice of such covin.

Fraudu-
lent intent,
express,
or
implied.

Hence a voluntary settlement of real or personal property may be set aside by a creditor of the settlor upon his showing an intent on the part of the settlor to delay, hinder, or defraud his creditors. This intent may be actual and express (y), or it may be inferred in different ways, as, for instance, by showing that the settlor was insolvent at the time of the settlement, or even that he was largely indebted (z), or that after deducting the settled property, sufficient available assets were not left for pay-

(x) *Jefferys v. J.*, Cr. & Ph. 138;
Dillon v. Coppin, 4 My. & Cr. 647.
(y) *Spirett v. Willows*, 3 De G. J.
& S. 293.

(z) *Townsend v. Westacott*, 2 Beav.
340; *Taylor v. Coenen*, 1 Ch. D.
636.

ment of the debts (*a*). To quote the words of Lord Hatherley in *Holmes v. Penny* (*b*), "The settlor must have been at the time, not necessarily insolvent, but so largely indebted as to induce the Court to believe that the intention of the settlement, taking the whole transaction together, was to defraud the persons who, at the time of the settlement, were creditors of the settlor."

When implied.

It has been decided, however, that the protection of the Act is not limited to those who were creditors "at the time of the settlement." A deed designed to defraud future creditors, such as a settlement of all or nearly all his present and future property, especially by a person about to engage in trade, is void as against such creditors (*c*).

Extends to future creditors.

A creditor may, by his concurrence with or acquiescence in a deed voidable under 13 Eliz. c. 5, preclude himself and his representatives from impeaching such deed (*d*), and an inquiry may be directed to ascertain whether any creditors of a settlor had so acquiesced (*e*).

Creditor's remedy lost by acquiescence.

A purchaser from a volunteer under a deed void under the statute will be preferred to the general creditors who have no specific charge (*f*).

Purchaser from volunteer preferred to creditor.

Choses in action, having since 1 & 2 Vict. c. 110, become available for the payment of debts under an execution, are within the statute (*g*).

Choses in action within the statute.

A voluntary deed executed *pendente lite* for the purpose of defeating any process in the nature of execution will be set aside in equity (*h*); and also a deed executed when a man knows that a decision is about to be pronounced against him (*i*).

Voluntary assurances *pendente lite* set aside.

2. The Bankruptcy Act, 1869 (*k*), contains a clause more

Bank-

(*a*) *Freeman v. Pope*, 5 Ch. 538.

(*b*) 3 K. & J. 90.

(*c*) *Ware v. Gardner*, 7 Eq. 317;

Mackay v. Douglas, 14 Eq. 106.

(*d*) *Olliver v. King*, 8 De G. M. & G. 110.

(*e*) *Freeman v. Pope*, 9 Eq. 206, 212.

(*f*) *George v. Milbanke*, 9 Ves. 190.

(*g*) *Stokoe v. Cowan*, 29 Beav. 637.

(*h*) *Blenkinsopp v. B.*, 12 Beav. 568; 1 De G. M. & G. 495.

(*i*) *Barling v. Bishop*, 29 Beav. 417.

(*k*) 32 & 33 Vict. c. 71.

ruptcy Act, 32 & 33 Vict. c. 71, stringent in some respects against voluntary settlements than 13 Eliz. c. 5, in that, with the exceptions to be mentioned, it makes void as against creditors any settlement made by a trader within two years previous to his bankruptcy; and in case of bankruptcy within ten years of such settlement it throws upon the parties claiming under the settlement the burden of proving that the settlor was at the time of making it able to pay his debts (*l*).

Excep-
tions in.

It, however, excepts from its operation settlements made before, and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to him after marriage in right of his wife. Such settlements will, therefore, be upheld, irrespective of any question of solvency (*m*).

The word "purchaser" in this section has been held to mean a "buyer" in the commercial sense, not a purchaser in the wide legal meaning of the word, this section differing in this respect from 27 Eliz. c. 4 (*n*).

Fraud on
pur-
chasers.
27 Eliz.
c. 4.

3. By 27 Eliz. c. 4, it is enacted that every conveyance, grant, charge, lease, limitation of use of, in or out of any lands, tenements, or other hereditaments whatsoever, for the intent and purpose to defraud and deceive such persons, &c., as shall purchase the said lands, or any rent or profit out of the same, shall be deemed only against such persons, their heirs, &c., who shall so purchase for money or any good consideration the said lands, &c., to be wholly void, frustrate, and of none effect.

Applies to
lands only.

Thus a voluntary settlement of *lands* will be held void against subsequent purchasers for value by the settlor, including mortgagees (*o*), lessees (*p*), and trustees taking under settlements for valuable consideration (*q*), *even with notice*

Who are
pur-
chasers.

(*l*) Sect. 91.

(*m*) *Exp. Bishop*, 8 Ch. 718.

(*n*) *Exp. Hillman*, 10 Ch. D. 622.

(*o*) *Dolphin v. Aylward*, 4 L. R.

H. L. 486.

(*p*) *Lewis v. Hopkins*, 9 East, 70, cited.

(*q*) *Watkins v. Stevens*, Nels. 160.

of the settlement (*r*); and it is no support to a settlement that it is a fair provision for a wife and children (*s*). Volunteers, moreover, cannot restrain their settlor from selling the settled estates (*t*). A judgment creditor is not deemed to be a purchaser within the Act (*u*).

A conveyance apparently voluntary may be supported by collateral evidence showing a contract for value (*x*).

A *bonâ fide* settlement, though voluntary, cannot be defeated by the conveyance for value of the heir or devisee of the settlor (*y*). Nor can a person who purchases for value from one claiming under a second voluntary conveyance, or from any other than the person who made the voluntary conveyance in his lifetime, claim the benefit of the statute (*z*).

Where a voluntary settlement of land is avoided by a subsequent sale for valuable consideration, the volunteers have no equity against the purchase money payable to the settlor (*a*).

It should also here be mentioned that a small and inadequate consideration is sufficient to support a settlement against a purchaser (*b*). Thus, though leaseholds are within the Act, if a person takes them subject to onerous covenants, the liability so incurred is deemed a sufficient consideration to support his title against a subsequent purchaser (*c*).

There has been much discussion as to the sufficiency and scope of the consideration of marriage under this Act.

Marriage has always been recognised in both law and equity as a valuable consideration; and it is quite clear

(*r*) *Doe v. Manning*, 9 East, 59.

(*s*) *Ibid.*

(*t*) *Pulvertoft v. P.*, 18 Ves. 84; *Buckle v. Mitchell*, *ibid.* 100.

(*u*) *Beavan v. E. of Oxford*, 6 De G. M. & G. 507.

(*x*) *Pott v. Todhunter*, 2 Coll. 76; *Townend v. Toker*, 1 Ch. 446.

(*y*) *Lewis v. Rees*, 3 K. & J. 132.

(*z*) *Richards v. Lewis*, 11 C. B. 1035.

(*a*) *Daking v. Whimper*, 26 Beav. 568.

(*b*) *Bayspool v. Collins*, 6 Ch. 228, 232.

(*c*) *Price v. Jenkins*, 5 Ch. D. 619.

Volunteers have no equity on purchase money.

Small consideration sufficient to support a purchaser.

Consideration of marriage.

Valuable.

Not sup-
porting
post-
nuptial
settle-
ment.

that an ante-nuptial written agreement, followed by marriage, puts the wife and children of the settlor in the position of purchasers within the statute (*d*). Whether a post-nuptial settlement made in consideration and pursuance of an ante-nuptial *parol* agreement is good as against a subsequent purchaser for value, even with notice, is doubtful (*e*). In the case of such a settlement made without referring to any previous agreement, though a previous agreement had been made by the husband while an infant, it was held that the settlement could not prevail against a subsequent purchaser (*f*), and it is clear that a mere post-nuptial settlement, without any ante-nuptial agreement, is void against a subsequent purchaser even with notice (*g*), though such a settlement will be supported on very slight consideration (*h*).

Scope of
the con-
sideration.

As to the scope of the marriage consideration, it has been held not to extend to collaterals, or the children of a future marriage (*i*). But children of a former marriage, and even a previously born illegitimate child of the wife, were held to be entitled as against a subsequent purchaser (*k*). A limitation in favour of collaterals, indeed, has been supported where there has been a party to the settlement who has purchased on their behalf (*l*).

Compari-
son of 13
Eliz. c. 5,
and 27
Eliz. c. 4.

4. It is convenient here to call attention to some important distinctions between 13 Eliz. c. 5, and 27 Eliz. c. 4, and also to some matters which are common in their application to both of those statutes.

(1.) It will have been observed that while 13 Eliz. c. 5, applies to *all* covinous conveyances, and thus includes

(*d*) *Kirk v. Clark*, Prec. in Ch. 275; *Teasdale v. Braithwaite*, 4 Ch. D. 85; 5 Ch. D. 630.

(*e*) *Dundas v. Dutens*, 2 Cox, 235; *Spurgeon v. Collier*, 1 Eden, 55; *Warden v. Jones*, 2 De G. & J. 76.

(*f*) *Trowell v. Shenton*, 8 Ch. D. 318.

(*g*) *Butterfield v. Heath*, 15 Beav.

408.

(*h*) *Hewison v. Negus*, 16 Beav. 594; *In re Foster & Lister*, 6 Ch. D. 87.

(*i*) *Wollaston v. Tribe*, 9 Eq. 44; *Johnson v. Legard*, 3 Madd. 283.

(*k*) *Newstead v. Searles*, 1 Atk. 265; *Clarke v. Wright*, 6 H. & N. 849.

(*l*) *Heap v. Tonge*, 9 Ha. 104.

chattels and choses in action as well as lands, 27 Eliz. c. 4, relates only to fraudulent conveyances of *lands* (leaseholds, however, included). Subsequent purchasers of chattels personal, therefore, have no remedy under the statute against a person claiming such under a prior voluntary settlement.

(2.) A voluntary settlement under either statute is only interfered with as far as the purposes of the statute in question require. It may be void against creditors in one case, or purchasers in the other, but it is, nevertheless, valid against and irrevocable by the settlor or grantor himself. He can not only not set aside the settlement, but he cannot come into a Court of equity to enforce on an unwilling purchaser the specific performance of a contract for sale of an estate which he has previously settled (*m*), though the purchaser might so enforce the very same contract (*n*). It has, however, been decided that if the purchaser is willing to complete on a good title being shown, the vendor may get a decree (*o*).

Voluntary settlements only affected as far as necessary for purposes of the statutes.

Similarly, also, if only a part of the settled estate has been sold, and the settlement is set aside as to that part, it nevertheless remains good as to the remainder (*p*); and where a man by a voluntary deed, void against creditors, conveyed real estate for the benefit of his wife and children and afterwards became bankrupt, the surplus of the estate so settled was held bound by the trusts of the settlement (*q*).

E. *Trusts for the payment of debts.*

Voluntary trusts for the payment of debts are regulated by principles quite distinct from those which have been above discussed, and must be considered separately.

Trusts to pay debts.

A legal transfer of property for payment of the debts of the owner, as long as it is not known or concurred in by

Revocable till communicated

(*m*) *Smith v. Garland*, 2 Mer. 123.

(*n*) *Daking v. Whimper*, 26 Beav. 568; *Trowell v. Shenton*, *sup.*

o) *Peter v. Nicolls*, 11 Eq. 391.

(*p*) *Croker v. Martin*, 1 Bligh, N. S. 573; 1 D. & C. 15.

(*q*) *French v. F.*, 6 De G. M. & G. 95.

to credi-
tors,

the creditors, does not invest creditors with the character of *cestui que trusts*. It is considered merely as a direction to the trustees as to the method in which they are to apply the property vested in them for the benefit of the owner of the property, who alone stands in the relation of *cestui que trust*, and can vary or revoke the trusts at his pleasure (*r*). Courts of equity, therefore, will not, at the instance of creditors, who are looked upon as mere strangers, compel the trustees to execute the trusts for the payment of debts (*s*).

or acted
upon; not
so after-
wards.

Where, however, such a settlement has been acted upon (*t*), or even, it seems, if it has been communicated to the creditors, it can no longer be revoked by the settlor, since the creditors, being aware of such a trust, might be thereby induced to a forbearance in respect of their claims which they would not otherwise have exercised, and after which it would be unjust to disappoint them (*u*). And if one of the creditors is made trustee for himself and the other creditors, and the assignment has been communicated to him and received his assent, it cannot afterwards be revoked by the assignor (*x*). Again, where property had been conveyed upon trust for payment of debts, to a person who was surety for some of the debts, though the creditors were neither parties nor privy thereto, the trustee was held entitled to retain it until discharged from his liability as surety (*y*). If also the trust has been communicated to some creditors, it apparently cannot after their debts are satisfied be revoked as to the remaining creditors (*z*).

What is
sufficient
communi-
cation.

Creditor
party to
the deed.

Where a creditor is party to a deed whereby his debtor conveys property to a trustee to be applied in liquidation

(*r*) *Walwyn v. Coutts*, 3 Mer. 707; 3 Sim. 14.

(*s*) *Ibid.*; *Garrard v. Lauderdale*, 3 Sim. 1; 2 Russ. & M. 451; *Acton v. Woodgate*, 2 My. & K. 492.

(*t*) *Cosser v. Radford*, 1 De G. J. & S. 585.

(*u*) *Acton v. Woodgate*, 2 My. & K. 492, 495.

(*x*) *Siggers v. Evans*, 5 E. & B. 367.

(*y*) *Wilding v. Richards*, 1 Coll. 655.

(*z*) *Griffith v. Ricketts*, 7 Ha. 307.

of the debt due to that creditor, the deed is as to him irrevocable; a valid trust in his favour is created (*a*); and what is true where a single creditor is *cestui que trust*, is of course equally so where there are many such. It suffices also if a creditor is party to a deed, though in another right than as *cestui que trust* for the amount of his debt (*b*). In a case where an assignment was made to a trustee for the benefit of creditors, but no creditor was aware of such assignment, it was held that the trustee might sue in equity against a third party to recover property of the settlor outstanding in such third party (*c*).

Though there is a time limited in the deed within which creditors are directed to execute it, yet if by accident any of them fail to do so, they will not necessarily lose the benefit of the trusts, if they eventually act under or upon the faith of the deed, or acquiesce in it (*d*).

A creditor, however, who for a long time delays (*e*), or who refuses to execute the deed, and does not retract his refusal within the time limited (*f*), and *à fortiori* if he sets up a title adverse to the deed (*g*), will not be allowed to claim the benefit of its provisions. And generally the Court before it permits a creditor to claim the benefit of a deed will see that he has performed all the fair conditions of the deed; and if he has taken any step inconsistent therewith, he will be deprived of all advantage therefrom (*h*).

(*a*) *Mackinnon v. Stewart*, 1 Sim. N. S. 88.

(*b*) *Montefiore v. Brown*, 7 H. L. 241, 266.

(*c*) *Glegg v. Rees*, 7 Ch. 71.

(*d*) *Raworth v. Parker*, 2 K. & J. 163; *In re Baber's Trusts*, 10 Eq. 554.

(*e*) *Gould v. Robertson*, 4 De G. & Sm. 509.

(*f*) *Johnson v. Kershaw*, 1 De G. & Sm. 260.

(*g*) *Watson v. Knight*, 19 Beav. 369.

(*h*) *Field v. Donoughmore*, 1 Dru. & W. 227.

Long delay
to execute
deed or
conduct
opposed to
the deed
bars
creditor's
claim.

SECTION III.—RESULTING TRUSTS.

Definition and Classification.

I. *Parting with Legal and retaining Equitable Interest.*

II. *Purchase in name of Third Persons.*

III. *Exceptions.*

Presumption of Advancement.

Dyer v. Dyer.

IV. *Joint Purchases.*

Lake v. Gibson.

Definition. Where the owner of property so deals with it that equity presumes an intention on his part to sever the legal and equitable interest, it gives effect to such presumed intention by applying the principle of trusts. These trusts are termed resulting (or, by some authors, implied) trusts.

Classification. There are two leading classes of resulting trusts. First, where an owner parts with the legal estate by conveyance, devise, or bequest, and equity presumes that he had no intention to part with the equitable interest. Secondly, where a purchaser directs a conveyance of the legal estate to be made to a third person, but equity presumes an intention to retain the equitable interest.

I. Resulting trusts where an owner parts with the legal interest intending to retain the equitable.

The inquiry suggested by this class of cases is, on what grounds the Court will now hold that a settlor or testator did not intend to part with the equitable interest?

(1.) *Where such intention is expressed.*

The clearest case is where an intention not to benefit

On what grounds intention to retain equitable interest is presumed. Express intention.

the grantee, devisee, or legatee is actually expressed upon the instrument which transfers the legal estate.

We have already seen that where a trust is evidently intended to be created, the person into whose hands the legal estate is transferred cannot hold it beneficially (p. 36). Thus where a bequest is made to a person "upon trust," and no trust is declared (*i*), or the trusts declared are too vague to be executed (*k*), or are void for unlawfulness (*l*), or fail by lapse (*m*), the trustee can have no pretence for claiming the beneficial ownership, the whole property being clearly impressed with a trust. In such cases, therefore, the trust will result to the settlor or his representatives, or the heir as to realty, the next of kin as to personalty; and the trustee cannot defeat the resulting trust by parol evidence in his favour (*n*).

(2.) *Where the intention is presumed.*

(i.) It was an ancient and well known principle of equity before the Statute of Uses, that when a feoffment of real estate was made to a person without consideration, the use at once resulted to the feoffor, and in equity he continued to enjoy the beneficial interest. The same principle is still applicable, but, as we shall see, upon somewhat different terms from those which were anciently regarded with respect to uses. Formerly, a consideration, however trifling, was sufficient to entitle the feoffor to the use of the lands of which he was enfeoffed. Modern equity, however, makes a wider inquiry than as to the mere payment or non-payment of a nominal consideration, before it decides as to the title to the beneficial enjoyment; and it is especially vigilant to observe any indications of fraud or mistake having affected the transaction (*o*).

(*i*) *Dawson v. Clarke*, 18 Ves. 247, 254; *Barrs v. Fewke*, 2 H. & M. 60.

(*k*) *Fowler v. Garlike*, 1 R. & M. 232; *Leavers v. Clayton*, 8 Ch. D. 584.

(*l*) *Carriek v. Errington*, 2 P. Wms. 361.

(*m*) *Ackroyd v. Smithson*, 1 Bro.

C. C. 503, *et infra*, p. 434, *et seq.*

(*n*) *Langham v. Sanford*, 17 Ves. 442; 19 *ib.* 643; *Irvine v. Sullivan*, 8 Eq. 673.

(*o*) *Birch v. Blagrave*, Amb. 264; *Lloyd v. Spillet*, 2 Atk. 150. As to the doctrine of advancement, see *Dyer v. Dyer*, *infra*, p. 71.

Where declared trusts do not exhaust the property.

(ii.) Perhaps the most important class of cases under this head are those in which a settlor conveys property on trusts which do not exhaust the whole property. In such cases generally there will be a resulting trust in favour of the settlor of so much of the property as is unaffected by the trust declared (*p*).

Special rules as to charities.

With respect, however, to gifts to charities, there are certain special rules which must be observed (*q*).

No resulting trust where a general intention of charity expressed;

Where a person makes a valid gift, whether by deed or will, and expresses a *general* intention of charity, but either particularises no objects (*r*), or such as do not exhaust the proceeds (*s*), the Court will not suffer the property in the first case, or the surplus in the second, to result to the settlor or his representative, but will take upon itself to execute the general intention, by declaring the particular purposes to which the fund shall be applied.

nor where trusts declared at the time exhaust the proceeds.

Where a person settles lands, or the rents and profits of lands, to purposes which at the time exhaust the proceeds, but in consequence of an increase in the value of the estate an excess of income subsequently arises, the Court will order the surplus, instead of resulting, to be applied in the same or a similar manner with the original amount (*t*).

But trust results where all is not at first disposed of.

But even in the case of a charity, if the settlor do not give the land or the whole rents of the land, but, noticing the property to be of a certain value, appropriates part only to the charity, the residue will then, according to the circumstances of the case, either result to the heir-at-law (*u*), or if the donee be itself an object of charity (as in the case of a charitable corporation) will belong to the donee subject to the charge (*x*).

Contrast between

(iii.) The distinction must be observed between a devise

(*p*) *Parnell v. Hingston*, 3 Sm. & G. 337, 344.

(*q*) Lewin, 7th edit. p. 147.

(*r*) *Att.-Gen. v. Herrick*, Amb. 712.

(*s*) *Att.-Gen. v. Tonner*, 2 Ves. jr. 1.

(*t*) *Beverley v. Att.-Gen.*, 6 H. L. 310.

(*u*) *Att.-Gen. v. M. of Bristol*, 2 J. & W. 308.

(*x*) *Beverley v. Att.-Gen.*, *sup.*; *Att.-Gen. v. South Moulton*, 5 H. L. 1.

to a person for a particular purpose with no intention of charge and conferring a beneficial interest, and a devise with a view ^{trust for special purposes} of conferring a beneficial interest, but subject to a particular direction. If a testator gives to A. and his heirs all his real estate charged with his debts, that is a devise which includes a particular purpose, but is not restricted to it. The devisee, therefore, takes the beneficial interest subject to the debts; but if the testator devises all his real estate to A. and his heirs upon trust to pay his debts, that is a devise solely for a particular purpose, with no intention to confer a beneficial interest. If there be any surplus, therefore, after payment of the debts, it results to the heir of the testator (*y*).

3. This species of resulting trust being dependent upon Parol evidence as to instruments *inter vivos* by parol evidence of the settlor's intention (*z*).

For the extensive class of resulting trusts which depend upon the doctrine of conversion, and which would in a strict classification be here treated of, see *infra*, p. 434, *et seq.*

II. Purchases in the Names of Third Persons.

(1.) The second order of resulting trusts comprises those which arise when a person purchases an estate but takes a conveyance in the name of another person. ^{Where purchaser takes a conveyance in name of a third person. Illustrated.}

The general principle on which they rest may be thus illustrated. Suppose A. advances the purchase-money of a freehold, copyhold, or leasehold estate, and a conveyance, surrender, or assignment of the legal interest in it is made either to B., or to B. and C., or to A., B. and C., jointly or successively; in all these cases if B. and C. are strangers, a trust will result in favour of A. The doctrine applies equally to real and personal property (*a*).

(*y*) *King v. Denison*, 1 V. & B. 42, 50; *Fowkes v. Pascoe*, 10 Ch. 343.
272.

(*a*) *Sidmouth v. S.*, 2 Beav. 447,

(*z*) *Cook v. Hutchinson*, 1 Keen, 454.

In connexion therewith it will be convenient first to consider some important rules of evidence respecting these trusts.

When
parol evi-
dence ad-
missible to
prove by
whom pur-
chase-
money is
paid.

(2.) *General rules of evidence.*

(i.) If the advance of the purchase-money by the real purchaser does not appear on the face of the deed, and even if it is stated to have been by the nominal purchaser, parol evidence is admissible to prove by whom it was actually made (*b*), resulting trusts being, by sect. 8, expressly excepted from the operation of the Statute of Frauds.

But where the trust does not arise on the face of the deed itself, the parol evidence must prove the fact of the advance of the purchase-money very clearly (*c*); and doubt has been expressed whether such evidence is admissible after the death of the nominal purchaser (*d*). It is not, however, easy to see how his death affects the principle (*e*). If the nominal purchaser admits the payment of the money by the real purchaser, a trust will doubtless result (*f*); and where he, by answer to a bill, denied such payment, parol evidence was admitted to contradict him (*g*).

In a case in which a defendant purchased an estate in his own name with his own money, and the plaintiff alleged that he did so as agent for him, which the defendant denied, parol evidence tendered by the plaintiff to prove a verbal agreement constituting the agency was rejected, on the ground that such a case was not within the exception of the statute, since no trust there arose by operation of law, but it was sought to raise one by parol evidence of an agreement (*h*). But this decision has been questioned as being inconsistent with the principle that the Statute of Frauds is not to be made an instrument of fraud (*i*).

(*b*) *Peachey's Case*, Sugd. V. & P. 910, 11th ed.

(*c*) *Gascoigne v. Thwing*, 1 Vern. 366; *Willis v. W.*, 2 Atk. 71.

(*d*) *Sandars on Uses*, 1, 354, 5th ed.; *Chalk v. Dancers*, 1 Ch. Ca. 310.

(*e*) *Lench v. L.*, 10 Ves. 511, 517.

(*f*) *Ryal v. R.*, 1 Atk. 58.

(*g*) *Gascoigne v. Thwing*, *sup.*

(*h*) *Bartlett v. Pickersgill*, 1 Eden, 515.

(*i*) *Heard v. Pilley*, 4 Ch. 548.

(ii.) Parol evidence is admissible to prove that a purchase has been made with trust money, and upon that being proved a trust will result in favour of the *cestui que trust*, the real owner of the money (*k*). To prove purchase with trust money.

(iii.) Since resulting trusts arise from equitable presumption, they may be rebutted by parol evidence which shows an intention in the person advancing the purchase-money that the person to whom the property was transferred should take for his own benefit (*l*); and such an intention existing at the time of the purchase cannot be subsequently altered (*m*). Resulting trusts may also be rebutted as to part and prevail as to the other part, as where an intention is proved to confer a life interest on the nominee (*n*). To show intention of advancement.
Presumption rebutted in part.

(iv.) Parol evidence of interested parties is admissible to rebut a resulting trust, but in order to be sufficient for that purpose it must be at least corroborated by surrounding circumstances (*o*). Evidence of interested parties.

(v.) The presumption of a resulting trust will be rebutted by acquiescence for a considerable time in the enjoyment of the property by the person in whose name it was purchased (*p*). Acquiescence.

(vi.) And where there is an express trust declared upon a purchase made in names of strangers, though but by parol, there can be no resulting trust; for resulting trusts, though excepted from the Statute of Frauds, were only left as they were before the Act, and a bare parol declaration before the Act would have prevented any resulting trust (*q*). Express trust evidenced.

(*k*) *Lench v. L.*, *sup.*

(*l*) *Goodright v. Hodges*, 1 Watk. Cop. 227, Loftt. 230; *Redington v. R.*, 3 Ridg. P. C. 178.

(*m*) *Groves v. G.*, 3 Y. & J. 163, 172.

(*n*) *Lane v. Dighton*, Amb. 409;

Fowkes v. Pascoe, 10 Ch. 343.

(*o*) *Fowkes v. Pascoe*, *sup.*

(*p*) *Delane v. D.*, 7 Bro. P. C. 279; *Clegg v. Edmondson*, 8 De G. M. & G. 787.

(*q*) *Bellasis v. Compton*, 2 Vern. 294; *Ayerst v. Jenkins*, 16 Eq. 275.

III. *Exceptions from the General Rule in such Purchases.*

Where it
would con-
travene an
Act of
Parlia-
ment.

1. There will be no resulting trust where the policy of an Act of Parliament would be thereby defeated. Thus it was held that no trust resulted in favour of a person advancing the purchase-money of a ship registered in the name of another, for the register, according to the policy of the old Registry Acts, was conclusive evidence of ownership both at law and in equity (*r*). By the Merchant Shipping Act, 1854 (*s*), however, after enacting that not more than thirty-two individuals shall be entitled to be registered at the same time as owners of any one ship, it is provided that that rule shall not affect the beneficial title of any numbers of persons, or of any company represented by or claiming under or through any registered owner or joint-owner. S. 37 (2). Where, moreover, a person having no title to a ship procures it to be registered in his name, the Court of Chancery will compel him to retransfer it to the rightful owner, and account for the earnings, even though there have been no fraud, and notwithstanding the Merchant Shipping Act (*t*).

On a similar principle, a trust will not, it seems, result in favour of a person who has purchased an estate in the name of another in order to give him a vote in electing a member of Parliament (*u*). Where, moreover, a person having deposited moneys in a savings bank up to the full amount allowed by statute, made further deposits to an account in his own name in trust for his sister, giving her no notice of the investment, it was held that the only intention being to evade the Act of Parliament, no trust was created, and the claim of the sister was refused (*x*).

(*r*) *Exp. Gallop*, 15 Ves. 60, 68.

(*s*) 17 & 18 Vict. c. 104, amended by 25 & 26 Vict. c. 63.

(*t*) *Holderness v. Lamport*, 29 Beav.

129.

(*u*) *Groves v. G.*, 3 Y. & J. 163, 175.

(*x*) *Field v. Lonsdale*, 13 Beav. 78.

2. *Presumption of advancement.*

A more important class of cases is that which springs from the doctrine of advancement. On this a leading authority is

Presump-
tion of
advance-
ment.

DYER v. DYER.

[2 Cox, 92 ; 1 W. & T. L. C. 223.]

There copyholds were granted to A. and B. his wife and C. his younger son to take in succession for their lives and the life of the survivor. The purchase-money was all paid by A. Nevertheless, C. being a son of A. was held not to be a trustee of his life interest for A., but to take beneficially, the presumption being that the purchase was intended by the father to effect an advancement of the son.

(1.) The general rule applying equally to real and personal property is that where a purchase is made in the name of a child there will *prima facie* be no resulting trust for the parent, but, on the contrary, a presumption arises that an advancement was intended. For this *Dyer v. Dyer* is a very strong authority, since there the purchaser had given some indication of an intention contrary to advancement by having actually devised the purchased property (y).

General
rule

in favour
of chil-
dren,

(2.) The presumption of advancement arises not only in favour of children, but also in that of persons towards whom the purchaser has put himself *in loco parentis*. Thus an illegitimate child (z), a grandchild (a), and the nephew of a wife (b), and many others in similar circumstances, have been held entitled to the benefit of property purchased in their name. In the case of a grandchild, however, it is important to inquire whether his father is living, as it has been held that if so the *locus parentis* of the grandfather will not avail to raise the presumption (c).

or where
donor
stands in
loco
parentis,

(y) *Finch v. F.*, 15 Ves. 43 ; *Sidmouth v. S.*, 2 Beav. 454.

(z) *Beckford v. B.*, Lofft. 490.

(a) *Ebrand v. Dancer*, 2 Ch. Ca. 26.

(b) *Currant v. Jago*, 1 Coll. 261.

(c) *Tucker v. Burrow*, 2 H. & M. 515.

or of a
wife.

(3.) The presumption also rises in favour of a wife (*d*); and also where there has been a purchase in the joint names of the purchaser, his wife, and a stranger (*e*).

But there is no similar presumption if the purchaser stands merely *in loco mariti*, and has purchased in the name of a woman with whom he has been cohabiting, or has illegally gone through the form of marrying, such as a deceased wife's sister (*f*).

Not where
a mother
purchases
in the
name of a
child,

No presumption of advancement arises in the case of a purchase by a married woman out of her separate estate in the names of her children, she being under no legal obligation to provide for them (*g*); and though by sect. 14 of the Married Women's Property Act (*h*) married women are made liable to maintain their children out of their separate property, the obligation is not of the same nature as that of the father, and no presumption of advancement arises in the absence of other evidence of such intention (*i*). *A fortiori* it is submitted that notwithstanding the similar provision in sect. 13, no presumption would arise in case of a purchase in the name of a husband. A widowed mother, however, is, it seems, a person standing in such relation to her child as to raise a presumption in favour of her child (*j*); and of course in all such cases, if apart from the relationship an intention to advance is proved, there is no resulting trust (*k*).

or of a
husband.

Vendor
must
convey to
a wife or
child if
purchase
is in their
name.

Where a contract is entered into to purchase real property in the name of a wife or child, although the wife or child, being volunteers, could not sue for specific performance of the contract, nevertheless, if the vendor enforces, or is entitled to payment out of the husband's estate, the conveyance must be made to the wife or child (*l*). A

(*d*) *Kingdon v. Bridges*, 2 Vern. 67.

(*e*) *Re Eykyn's Tr.*, 6 Ch. D. 115.

(*f*) *Soar v. Foster*, 4 K. & J. 152.

(*g*) *Re de Visme*, 2 De G. J. & S. 17.

(*h*) 33 & 34 Vict. c. 93.

(*i*) *Bennet v. B.*, 10 Ch. D. 474.

(*j*) *Sayre v. Hughes*, 5 Eq. 376; *Batstone v. Salter*, 10 Ch. 431.

(*k*) *Beecher v. Major*, 2 D. & Sm. 431.

(*l*) *Redington v. R.*, 3 Ridg. P. C. 196; *Drew v. Martin*, 2 H. & M. 130.

binding contract to purchase in the joint names of a man and his wife has been held to entitle the wife to the benefit of the purchase as survivor (*m*).

3. Many circumstances have been taken into consideration as rebutting the presumption of advancement; but most of those formerly of weight are not now regarded. Thus at one time the infancy of the child was a circumstance against the purchase being considered an advancement; at present it tells strongly in the opposite direction (*n*). Again, it was once an argument against advancement that the property purchased was reversionary, and therefore not a proper provision for a child; but this would not now be of any avail (*o*). Lord Hardwicke regarded a purchase in the joint names of the parent and child as a weaker case for advancement than a purchase in the name of a son alone (*p*). Such a circumstance would now have little if any weight. The stranger, in such a purchase, would hold his share in trust for the father; the child would be considered advanced to the extent of his interest (*q*).

If a child has been already fully advanced, this affords an objection to the presumption, and the child *may* be held a trustee for its father; but such a circumstance is by no means conclusive (*r*). Partial advancement is of no weight against a child (*s*). It has been sometimes regarded as evidence of the absence of intention to advance, if the father remains in receipt of the rents or profits of the estate or fund purchased. The objection is, however, now without weight, certainly if the child is an infant (*t*), and apparently also if he is adult, unless strengthened by the additional circumstance of his being already fully advanced (*u*).

Circumstances formerly rebutting the presumption do not so now.

Presumption rebutted if child fully advanced.

(*m*) *Vance v. V.*, 1 Beav. 605.
 (*n*) *Lamplugh v. L.*, 1 P. Wms. 111; *Finch v. F.*, 15 Ves. 43.
 (*o*) *Rumboll v. R.*, 2 Eden, 15, 17;
Williams v. W., 32 Beav. 370.
 (*p*) *Pale v. P.*, 1 Ves. sr. 76.
 (*q*) *Grey v. G.*, 2 Swanst. 594,

599; *Dummer v. Pitcher*, 2 My. & K. 262, 272.

(*r*) *Hepworth v. H.*, 11 Eq. 10.

(*s*) *Redington v. R.*, *sup.*

(*t*) *Loyd v. Reid*, 1 P. Wms. 688.

(*u*) *Grey v. G.*, 2 Swanst. 594, 600.

Advance-
ment void
against
creditors.

Where an advancement is made by a person largely indebted at the time, it will be void as against creditors under 13 Eliz. c. 5 (*v*); but 27 Eliz. c. 4, has no similar application in favour of purchasers (*x*).

Child
solicitor
for the
parent.

And where the relation of client and solicitor subsists between the parent and child, the ordinary presumption in favour of advancement will be excluded, and the burden of proving its validity will be thrown on the son acting as solicitor (*y*).

Son may
repudiate
onerous
property.

Where a father makes a purchase in the name of a son, of property which is attended with risk of loss, the Court may on the part of the son repudiate his interest, in which case the father remains liable (*z*).

Unpaid
purchase-
money
payable
out of
father's
assets.

In a case of advancement, where part of the purchase-money remains unpaid, it is a debt payable out of the assets of the father (*a*).

4. *Rules of evidence as to presumption of advancement.*

Evidence
to rebut
the pre-
sumption.

(1.) The presumption of advancement may be rebutted by evidence of facts showing the father's intention that the son should take the property as a trustee, and not for his own benefit. Such facts must, however, have taken place antecedently to, or contemporaneous and in immediate connexion with, the same transaction (*b*). For instance, if there is, on the purchase, an immediate and formal taking possession by the father, as by entering into a shop and putting his name over the door, that would be sufficient to establish ownership in the father and trusteeship in the son (*c*).

Contem-
poraneous
acts of
father.

Sub-
sequent
acts not
admissible.

Subsequent acts, however, are not admissible in evidence against the son's interest. Thus a devise as in *Dyer v. Dyer*,

(*v*) *Christy v. Courtenay*, 13 Beav. 96.

(*x*) *Drew v. Martin*, 2 H. & M. 130, 133.

(*y*) *Garrett v. Wilkinson*, 2 De G. & Sm. 244.

(*z*) *Reid's Case*, 24 Beav. 318;

Weston's Case, 5 Ch. 614.

(*a*) *Skidmore v. Bradford*, 8 Eq. 134.

(*b*) *Grey v. G.*, 2 Swanst. 594; *Collinson v. C.*, 3 De G. M. & G. 409.

(*c*) *Stock v. M'Avoy*, 15 Eq. 55, 59.

or a mortgage (*d*), or other such disposition of the property is of no avail (*e*).

(2.) The presumption of advancement may also be rebutted by evidence of parol declarations of the father contemporaneous with the purchase; but not of any declarations made subsequently (*f*).

Parol declarations contemporaneous; not subsequent. Evidence to support the presumption.

(3.) *A fortiori* parol evidence may be given by the son to show the intention of the father to advance him, such evidence being in support of both the legal interest of the son, and the equitable presumption (*g*).

(4.) The acts and declarations of the father subsequent to the purchase, though not admissible in his favour, are admissible against him in favour of the son (*h*), and it seems that subsequent acts and declarations of the son can be used against him by the father; though they would not be sufficient to counteract clear evidence of the father's original intention to advance the son (*i*).

Acts and declarations of father subsequent.

(5.) The father may not tender evidence in support of the trust, the effect of which would be to show that the transfer was intended to effect a fraud on the law, such as a conveyance of lands to the son for the purpose of qualifying him for an office or a vote (*k*).

Evidence showing fraud on the law not admissible for the father.

(6.) Any surrounding circumstances may be taken into consideration to rebut the presumption of advancement. Thus where a husband pays money into a bank to an account opened in his wife's name, and it appears that the account was opened for convenience sake, the intention being not to give the wife any interest in the money, but to enable her to act as agent, the money will remain the property of the husband (*l*). In another case, where it was considered that the transfer of the husband's account into the joint names of himself and his wife was made in

Surrounding circumstances considered.

(*d*) *Bach v. Andrew*, 2 Vern. 120.

(*e*) *Murless v. Franklin*, 1 Swanst.

13.

(*f*) *Elliott v. E.*, 2 Ch. Ca. 231; *Sidmouth v. S.*, 2 Beav. 447, 456.

(*g*) *Lamplugh v. L.*, 1 P. Wms. 113.

(*h*) *Redington v. R.*, 3 Ridg. P. C. 195, 197.

(*i*) *Sidmouth v. S.*, *sup.*; *Jeans v. Cooke*, 24 Beav. 513, 521.

(*k*) *Childers v. C.*, 3 K. & J. 310; *May v. M.*, 33 Beav. 81.

(*l*) *Lloyd v. Pughe*, 8 Ch. 88.

order to enable the wife to draw cheques, the same conclusion was reached (*m*).

IV. *Resulting Trusts arising from Joint Purchases.*

The principal authority on this species of trusts is

LAKE v. GIBSON.

LAKE v. CRADDOCK.

[3 P. Wms. 158 ; 1 W. & T. L. C. 200.]

In this case five persons purchased an estate as joint tenants in fee, but contributed rateably towards the purchase, after which some of them died. They were held to be tenants in common in equity ; and though one of the five deserted the partnership for 30 years, yet he was let in afterwards on terms.

General
rule at
law.

How
viewed in
equity.

Leaning
against
joint
tenancy.

Unequal

1. It is an invariable rule at law that when purchasers take a conveyance to themselves and their heirs they will be joint tenants and upon the death of one of them the estate will go to the survivor. The judgment of Sir J. Jekyll in the above case, expresses as clearly as possible how equity regards and treats this rule. Equity follows the law, except where circumstances exist which give rise to the presumption that the parties did not intend the rule of law to apply (*n*). This case shows that an unequal advance of the purchase money is regarded in equity as such a circumstance. In applying the rule thus stated, it must be remembered that in equity there is a strong leaning against joint tenancy ; and it readily seizes on any circumstance from which it can be reasonably implied that a tenancy in common was intended, so that it may hold the survivors of joint purchasers trustees of the legal estate for the representatives of the deceased purchaser.

Sir J. Jekyll qualified the general rule which he laid

(*m*) *Marshal v. Crutwell*, 20 Eq. 328.

(*n*) *Rigden v. Vallier*, 3 Atk. 735 ;

2 Ves. sr. 258 ; *Ardling v. Knipe*, 19 Ves. 441.

down by requiring, in order to justify the interference of equity with the rule of law, not only an unequal advance of purchase-money, but also that this should appear from the deed itself. Lord Hardwicke, however, lays down the same rule without this qualification (o).

2. Other circumstances than unequal advances may suffice to raise the presumption that tenancy in common was intended. Perhaps the most important class of such cases are those which arise in what are at law joint mortgages. At law the debt and security belong to the survivor. In equity, whether the money was advanced equally or unequally, mortgagees are deemed to be tenants in common, and the survivor is held to be a trustee for the personal representatives of the deceased mortgagee (p). It follows that the personal representatives of a deceased mortgagee are necessary parties in an action for foreclosure or redemption (q), and although the entire legal interest is in the survivor, they are necessary parties to a reconveyance, as they alone can give a valid discharge for their predecessor's share of the mortgage money; that is, of course, unless the mortgage deed contained a clause rendering the receipt of the survivor sufficient. And if joint mortgagees purchase or foreclose the equity of redemption, they will still be held in equity tenants in common, on the ground of presumed intention (r).

In *Robinson v. Preston* (s) a similar intention was presumed in the case of a purchase of stock and the opening of a bank account in their joint names by two sisters who resided together. The monies so dealt with arose from rents of land of which they were tenants in common. On this ground, strengthened by the facts that other monies similarly arising were invested on mortgage, the deed of which contained a declaration against joint tenancy, and

(o) *Rigden v. Vallier*, *sup.*; *Harri-* 529.
son v. Barton, 1 J. & H. 287, 293.

(p) *Montey v. Bird*, 3 Ves. 631.

(q) *Vickers v. Cowell*, 1 Beav.

(r) *Rigden v. Vallier*, *sup.*

(s) 4 K. & J. 505.

further that the survivor (against whom, of course, her own declaration might be read), by her will, executed in the lifetime of the deceased, spoke of "her share" of the property in question, and affected to dispose of it in favour of her sister, Vice-Chancellor Page Wood declared that the sisters were tenants in common in equity of the stock and bank balance. It should be mentioned, however, that in a somewhat similar, though distinguishable case, Lord Romilly came to a different conclusion (*t*).

Parol evidence admissible to show intention to hold severally.

It seems that parol evidence of subsequent dealings, as well as of surrounding circumstances, is, on a purchase by two persons contributing equally, admissible to prove an intention to hold in severalty; but that such evidence as to statements of intention is not admissible (*u*).

3. As to the operation of the principle of resulting trusts in cases of lands held as partnership assets, see Partnership (*infra*, pp. 539—541).

(*t*) *Bone v. Pollard*, 24 Beav. 283.

1 J. & H. 287, and *Devoy v. D.*, 3

(*u*) Compare *Harrison v. Barton*,

Sm. & G. 403.

SECTION IV.—CONSTRUCTIVE TRUSTS.

I. *Definition.*II. *Renewal of Leases by Trustees.*

Keech v. Sandford.

III. *Purchase of Trust Property by Trustees.*

Fox v. Mackreth.

I. *Definition and Description.*

When on the grounds of justice and good conscience, without reference to the intention of the parties, equity severs the legal from the equitable interest, a constructive trust is raised. Definition.

The usual circumstances from which these trusts proceed are where a trustee or any person clothed with a fiduciary character gains some personal advantage by availing himself of his situation as a trustee. As soon as such an advantage is acquired through the medium of a trust, the trustee, however good a legal title he may have, will be decreed in equity to hold for the benefit of the *cestui que trust*. Trustees, &c., gaining advantage from their trust.

The principle of constructive trusts enters into so many departments of equity, that it is desirable under this especial heading to deal only with some of the leading and most characteristic illustrations of it. In other parts of the work, for instance in considering the remuneration of trustees, and in the chapter on fraud, it will be necessary again to refer to the principle, and further illustrations thereof will be afforded.

The trusts by which effect is given to the liens of vendors and purchasers, though frequently classed as constructive trusts, are of a distinct nature. From their

intimate relation to mortgages, we have preferred to deal with them in connexion with that branch of the subject.

Renewal
of leases by
trustees,
&c.

II. Of constructive trusts, one extensive class arises from renewals of leases by trustees and other persons clothed with a fiduciary character, in their own names. The leading authority among cases of this description is

KEECH v. SANDFORD

[Sel. Ca. in Ch. 61 ; 1 W. & T. L. C. 46];

also commonly known as the *Rumford Market Case*.

In this case a person being possessed of a lease of the profits of a market devised his estate to a trustee in trust for an infant. Before the expiration of the term the trustee applied to the lessor for a renewal for the benefit of the infant. This was refused on the ground that, it being only the profits of a market, there could be no distress, and must rest simply in covenant, which the infant could not make. There was clear proof of the refusal to renew the lease for the benefit of the infant. On this refusal the trustee got a lease made to himself. A bill was brought by the infant to have the lease assigned to him, and for an account of the profits. The plaintiff relied on the principle that wherever a lease is renewed by a trustee or executor it shall be for the benefit of the *cestui que use*. The defendant admitted the principle, but denied that it was applicable to this case, because of the proof of an express refusal to renew to the infant. Lord Chancellor King said: "I must consider this as a trust for the infant; for I very well see, if a trustee, on the refusal to renew, might have a lease to himself, few trust estates would be renewed to a *cestui que use*. Though I do not say there is fraud in this case, yet the trustee should rather have let it run out than have had the lease to himself. This may seem hard, that the trustee is the only person of all mankind who might not have the lease; but it is very proper that the rule should be strictly pursued, and not in the

least relaxed; for it is very obvious what would be the consequences of letting the trustees have the lease on a refusal to renew to the *cestui que use*."

So it was decreed that the lease should be assigned to the infant, and that the trustee should be indemnified from any covenants comprised in the lease, and on account of the profits made since the renewal.

The rule laid down by Lord King has been invariably followed; the ground of the decisions being the public policy of preventing persons in such situations from acting so as to take a benefit to themselves (*x*).

1. *As to the persons to whom the doctrine extends.*

To whom
this doc-
trine
extends.

This doctrine of constructive trusts extends to the general inclusion of all persons standing in a fiduciary relation with respect to the property affected.

(1.) The leading case is sufficient authority for its application to express trustees. An executor stands in precisely the same position. Similarly an administratrix of a deceased yearly tenant, who obtained a new tenancy from year to year, was held to be trustee thereof for the next of kin of the intestate, though there was no suspicion of fraud (*y*). As to an executor *de son tort* renewing a lease in his own name, see *Mulvany v. Dillon* (*z*), *Griffin v. G.* (*a*).

Trustees,
executors
and ad-
ministra-
tors.

(2.) Another class, which is the subject of a great number and variety of decisions, is that of tenants for life, or others having a limited interest in renewable leaseholds, who renew the leases in their own names. In these cases they will be held trustees for those entitled in remainder to the old lease (*b*). Thus in *James v. Dean* (*c*), a testator bequeathed leaseholds for years determinable upon lives to his widow (who was his executrix and residuary legatee) for life, with remainder over: the term expired during the testator's life, but he continued to hold as tenant from year to year: the widow obtained a new lease to herself, but it

Tenants
for life.

(*x*) *Griffin v. G.*, 1 S. & L. 354.

(*y*) *Kelly v. K.* 8 I. R. Eq. 403.

(*z*) 1 Ba. & Be. 409, 417.

(*a*) 1 S. & L., 352.

(*b*) *Rowe v. Chichester*, Amb. 715.

(*c*) 11 Ves. 383; 15 Ves. 236.

Not to a
tenant at
will.

was held to be subject to the trusts of the will, as the residue of the term at the testator's death, however short, would have been. (See also *Trumper v. T.* (d).) But if the testator had been only a tenant at will or on sufferance, the case would have been different. Then the tenancy would have been determined by the death of the testator, and thus no interest would have passed by the will to the persons designated to take in remainder, and therefore they could not set themselves up as *cestui que trusts* against the tenant who availed herself of her position to get a renewal in her own name. But Lord Eldon (e) was inclined to think that had not the tenant for life in that case been residuary legatee, she would have been held a trustee for the residuary legatee, considering it impossible that the executrix (the life tenant) could hold for herself after availing herself of the position which she held for the benefit of the whole estate for the purpose of procuring the renewal. A renewal, then, under such circumstances, would have the effect of creating an accretion to the general estate (f).

Although the tenant for life under a settlement be the settlor himself, if he renew in his own name he will be a trustee for the parties interested under the settlement (g). As to the effect of the purchase of the reversion by a tenant for life, see *Isaac v. Wall* (h).

Tenant for
life receiv-
ing pay-
ment for
not oppos-
ing a bill
in Parlia-
ment

Similar in principle to these cases is that in which a tenant for life receives a sum of money for withdrawing his opposition to a bill in Parliament, and the Act then passes authorising the taking of the land in settlement. Whether, then, the land is taken or not, and whether the Act is proceeded upon or not, the money so received must be held for the benefit of all parties interested (i).

In *Cooper v. Phibbs* (j), Cooper, being in possession of certain estates and a fishery, which he had covenanted to

(d) 14 Eq. 295; 8 Ch. 870.

(e) 11 Ves. 393.

(f) Lewin on Trusts, 7th ed., p. 167; *Turner v. T.*, 14 Ch. D. 829.

(g) *Pickering v. Voutes*, 1 Bro. C.

C. 197.

(h) 6 Ch. D. 706.

(i) *Pole v. P.* 2 D. & Sm. 420; and see 8 & 9 Vict. c. 18, s. 73.

(j) 2 L. R. II. L. 149.

settle, after previous limitations to himself and his issue male, on his brother for life, with remainder to his issue male, procured an Act of Parliament, which, after reciting that the estates and fishery had descended to and were vested in Cooper, and that the said Cooper was desirous of constructing canals, &c., at his own expense, in consideration of the exclusive right of fishery being vested in him, his heirs and assigns, enacted that the said powers to make canals and cuts should be granted to him, provided that the cuts should be altogether situated on the estates and property of the said Cooper. In all the provisions of the Act, Cooper was spoken of as the owner of the estate. Cooper having died without issue male, the House of Lords held that under the Act of Parliament Cooper took the fishery, bound by the trusts of the settlement, Lord Westbury remarking, with characteristic irony: "I must of necessity assume that Cooper had the intention of stating the truth and the fact to the Legislature . . . therefore you cannot impute to him that he intended to conceal the trusts of the settlement. Then if he stood before Parliament as a trustee, the powers conferred are conferred upon him in his character as trustee, and would be subject to the trusts which affected the donee of those powers" (*k*).

(3.) Joint tenants are subject to a similar equity. If one of several persons jointly interested in a lease renews it in his own name, he will hold it in trust for the others according to their respective shares (*l*). Where a tenant for life, and a remainderman of a lease for lives, took a renewal thereof to themselves as joint tenants, in the absence of anything showing a contrary intention, equity regarded their prior interests as remaining unaltered (*m*). If a person jointly interested with an infant renew, and the renewed lease turn out to be not beneficial, the person renewing must sustain the loss; while if it prove bene-

(*k*) See also *Yem v. Edwards*, 3 K. & J. 564; 1 De G. & J. 598.

276. (*m*) *Hill v. H.*, 8 I. R. Eq. 140.

(*l*) *Palmer v. Young*, 1 Vern.

ficial the infant can claim his share of the benefit, provided that he contribute his due proportion to any sums which may have been paid for the renewal (*n*).

Partners. (4.) So, likewise, if a partner renew a lease of the partnership premises in his own name, he will, as a general rule, be held a trustee of it for the firm (*o*). But this rule has been departed from in certain cases where the business of the partnership in question has been of a speculative nature, such as a mining concern. In such circumstances, when a surviving partner has renewed a lease in his own sole name, and carried on the business with his own capital, the Court has refused to assist the representative of the deceased partner unless he has come forward promptly, and is ready to contribute a due proportion of money for the purpose of the business; since it would be clearly unjust to let the executor of the deceased partner remain passive while the survivor is incurring all the risk of loss, and only claim to participate after the affairs have proved to be prosperous (*p*). In order, however, to gain the benefit of this exception, the surviving partner must make full disclosure as to the state of the concern, such as will enable the representative to exercise a sound discretion as to the course he ought to pursue (*q*).

Agents. Similarly, a person acting as agent, or in any similar capacity for a person having an interest in a lease, cannot renew for his own benefit (*r*).

Mort-
gagee. (5.) If a mortgagee renew a lease of the mortgage premises, the renewal, whether before or after the expiration of the lease, shall be for the benefit of the mortgagor, on condition of his paying the mortgagee his charges (*s*). *Vice versa*, if the mortgagor obtains a new lease of the mortgaged property, the new lease will be held a graft on the

(*n*) *Exp. Grace*, 1 B. & P. 376.

(*o*) *Featherstonhaugh v. Fenwick*, 17 Ves. 298, 311; *Clegg v. Fishwick*, 1 Mac. & G. 294.

(*p*) *Clements v. Hall*, 2 De G. & J. 173.

(*q*) *Ibid.*, 188.

(*r*) *Griffin v. G.*, 1 S. & L. 353; *Edwards v. Lewis*, 3 Atk. 538.

(*s*) *Rushworth's Case*, Freem. 12; *Rakestraw v. Brewer*, 2 P. Wms. 511.

old one, for the benefit of the mortgagee (*t*). On the same principle, if a person entitled to a lease which is subject to debts, legacies, or annuities, renews either in his own name, or in that of a trustee, the incumbrances will remain a charge on the renewed lease (*u*).

(6.) The same remedies which may be had against trustees, executors, and persons with limited interests, renewing leases in their own names, may also be had against volunteers claiming through them, and against purchasers from them with notice, express or implied (*x*).

2. *The extent and incidents of the doctrine.*

These have to some degree been inevitably indicated in reciting the cases which show to whom the doctrine applies. But there remain some further comments necessary to a full exposition of the matter.

(1.) Though a person in the fiduciary positions described is termed a trustee, he is not in all respects treated like a trustee who is such by virtue of an express trust. The Statute of Limitations will, for instance, run in his favour, against persons claiming the benefit of the constructive trust (*y*). And the *cestui que trust* may, apart from the statute, be bound by acquiescence and lapse of time; especially, as we have seen in respect of partnership cases, where the property sought to be affected with the trust is subject to extraordinary contingencies, or is capable of being rendered productive only by a large and hazardous outlay (*z*).

(2.) The remaindermen and others who seek the benefit of a constructive trust, are required to indemnify the trustee against any covenants he may have entered into with the lessor (*a*); and the trustee will have a lien upon

(*t*) *Smith v. Chichester*, 2 Dr. & W. 393; *Hughes v. Howard*, 25 Beav. 575.

(*u*) *Scaborne v. Povel*, 2 Vern. 11.

(*x*) *Bowles v. Stewart*, 1 S. & L. 209; *Walley v. W.*, 1 Vern. 484.

(*y*) *In re Dane's Estate*, 5 I. R.

Eq. 498; *Knox v. Gye*, 5 I. R. H. L. 656, 675; *Met. Bank v. Heiron*, 5 Ex. D. 319.

(*z*) *Clegg v. Edmondson*, 8 De G. M. & G. 787; *Erlanger v. New Sombrero &c. Co.*, 3 App. C. 1218.

(*a*) *Giddings v. G.*, 3 Russ. 241.

Volunteers claiming through trustees, &c.

Constructive trustee not treated as an express trustee. Time runs in his favour.

Entitled to indemnity.

and lien
for outlay
on im-
prove-
ments and
costs.

the estate for the costs and expenses of renewing the lease, with interest (*b*), and for the cost of lasting improvements (*c*), though not for alterations adopted as a matter of taste or personal convenience (*d*).

Per contra
is charge-
able for
waste
rents and
profits.

On the contrary, charges in the nature of waste and for deterioration must be set off against anything thus found due (*e*); the trustee must account for the mesne rents and profits (*f*), such account in the case of a tenant for life of course commencing only from his decease (*g*), and must assign the lease free from incumbrances.

Court is
vigilant to
prevent
evasion.

(3.) The Court is vigilant to prevent any fraudulent evasion of the doctrine of constructive trusts. The case of *Cooper v. Phibbs* above commented on is a good illustration of this. Where, therefore, a lessee by collusion with his landlord incurred a forfeiture of his lease, and then obtained a new lease, the former trusts were held to attach thereto (*h*). So if a person who has a right of renewal sells such right, the money produced by the sale will be subject to the same trusts as the leaseholds if renewed would have been (*i*).

Cases of
com-
pulsory
purchases.

(4.) Where renewable leaseholds are taken by a railway or other company under compulsory powers, a tenant for life will only be entitled to the interest arising from the purchase money, although the custom to renew may not have ceased until after the premises were thus taken; at any rate, when the primary intention of the settlor appears to have been to create a perpetual estate (*k*).

Renewal
impossible;
accumu-
lated
sums.

(5.) When it is impossible to obtain the renewal of a lease, if there be no predominant trust for renewal overriding the disposition in favour of the subsequent tenant for life, the latter will, it seems, be entitled to the sum accumulated by the direction of the settlor for that pur-

(*b*) *Rave v. Chichester*, Amb. 715.

(*c*) *Holt v. H.*, 1 Ch. Ca. 190;
Walley v. W., 1 Vern. 487.

(*d*) *Mill v. Hill*, 3 H. L. 828,

869.

(*e*) *Ibid.*

(*f*) *Mulvany v. Dillon*, 1 Ball &

B. 409.

(*g*) *Giddings v. G.*, 3 Russ. 241.

(*h*) *Hughes v. Howard*, 25 Beav.
575.

(*i*) *Owen v. Williams*, Amb. 734.

(*k*) *Re Wood's Estate*, 10 Eq. 572.

pose (*l*). But where it appears to have been the paramount intention of the testator that those entitled in reversion expectant upon the decease of a tenant for life should succeed to the enjoyment of substantially the same estate, the tenant for life, upon the renewal becoming impracticable, will only be entitled to the income of the sum set apart for renewal and of the sum produced by the sale of the leaseholds (*m*).

And where a trustee, or person in a fiduciary position, who has acquired the legal possession of and dominion over an estate, subject to a covenant for perpetual renewal, so deals with the property as to make the renewal impossible, by his own act, and with a view to his own benefit, he is bound to give full effect to the charges on the trust estate, and to satisfy those charges out of the acquired estate, so far as may be necessary (*n*).

(6.) Although trustees with power to renew have power to purchase the reversion in leaseholds under 23 & 24 Vict. c. 124, the Court will not sanction such a purchase if it will have the effect of unduly burdening any particular person, as by considerably reducing the income of the tenant for life (*o*). But where a trust for renewal of leaseholds is absolute and overrules the interest of the tenant for life, he is not entitled to object on the ground of the reduction of his income, to any arrangement in lieu of renewal which may be made when renewal ceases to be practicable, as long as the best possible terms are made (*p*).

(*l*) *Morres v. Hodges*, 27 Beav. 625; *In re Money's Trusts*, 2 D. & Sm. 94.

(*m*) *Maddy v. Hale*, 3 Ch. D. 327.

(*n*) *Trumper v. T.*, 14 Eq. 295, 310; 8 Ch. 870.

(*o*) *Hayward v. Pile*, 5 Ch. 214.

(*p*) *Hollier v. Burne*, 16 Eq. 163.

Purchase
of rever-
sion in
lieu of re-
newal.

Purchase
of trust
property
by a
trustee.

III. *Constructive Trusts arising from a Purchase of Trust Property by a Trustee.*

This class of trusts is usually illustrated by reference to the important case of

FOX v. MACKRETH,
PITT v. MACKRETH,

[2 Bro. C. C. 400 ; 2 Cox, 320 ; 1 W. & T. L. C. 123]

in which a mortgagee who purchased the mortgaged property himself by taking an undue advantage of the confidence reposed in him, and sold it at a higher price, was decreed to be a trustee for the mortgagor of the sum produced by this sale.

Statement
of the prin-
ciple.

This case is usually referred to as having established the rule, ever since recognised and acted upon by Courts of Equity, that a purchase by a trustee for sale from his *cestui que trust*, although he may have given an adequate price, and gained no advantage, shall be set aside at the option of the *cestui que trust*, unless the connexion between them most satisfactorily appears to have been dissolved, and unless all knowledge of the value of the property acquired by the trustee has been communicated to his *cestui que trust*. The principle of the rule is, however, more clearly expressed by Lord Eldon in *ex parte Lacey* (q). He says : " It is founded upon this : that though you may see in a particular case that the trustee has not made advantage, it is utterly impossible to examine upon satisfactory evidence, in ninety-nine cases out of a hundred, whether he has made advantage or not. Suppose a trustee buys any estate, and by the knowledge acquired in that character discovers a valuable coal mine under it, and, locking that up in his own breast, enters into a contract with his *cestui que trust*, if he chooses to deny it, how can the Court try that against his denial ? The probability is that a trustee who has once conceived such a purpose will never disclose it, and the *cestui que trust* will be effectually

(q) 6 Ves. 625, 627.

defrauded." The decision then, in the principal case, depended not on whether the defendant purchased at an under value, but on the fact that he purchased it from his *cestui que trust* while that relation continued to subsist, and without a full disclosure. There are indeed many passages in Lord Thurlow's judgment which seem to point to the other as the ground of his decision, but as to these he subsequently admitted himself to have been mistaken, and declared the latter to be the true principle. Upon this principle the value was immaterial; for if the original transaction was right, it was of no consequence at what price Mackreth sold the estate afterwards; if it was wrong, Mackreth, not having discharged himself from the character of trustee, if an advantage was gained by the most fortuitous circumstance, still it was gained for the benefit of the *cestui que trust*, not of the trustee (r). We proceed to consider the application of the principle under the varying circumstances which have occurred in practice.

Value
given im-
material.

This inquiry conveniently resolves itself into two divisions. First, What are the limits of the application of the principle? Or, in other words, Is bargaining between a trustee and a *cestui que trust* ever supportable in equity, and if so, when? Secondly, What persons come so far within the definition of a trustee as to be affected by the principle which forbids such transactions? Subsidiary to these questions, it will be advisable to consider the nature of the relief afforded by equity in such cases.

1. *What are the limits of the application of the principle?*

Limits of
the prin-
ciple.

(1.) The cases already referred to are sufficient authority for the proposition that a trustee cannot by a direct and private contract with his *cestui que trust* become a purchaser of the trust estate. The rule is the same as to both real and personal estate, and, as has been seen, the question is not one of price (though naturally, if

Direct
private
contract.

(r) See Lord Eldon's judgment Ves. 381, 394.
above quoted, and *exp. Bennett*, 10

an adequate price was given, it would not probably be challenged), but of the position of the parties. Similarly, a trustee can no more take a lease than he can purchase from himself (*s*).

Purchase
at auction.

(2.) A purchase by trustees at a public auction will not be sustained; for if persons in such a capacity were present at an auction as bidders, their mere presence would operate as a discouragement to others. The knowledge that certain persons who naturally have superior means of information are bidding must inevitably check competition (*t*).

Purchase
through or
as an
agent,

(3.) Nor is it admissible for a trustee to purchase through an agent, even at an auction (*u*). On the other hand, he is equally disqualified from purchasing as an agent for another person (*v*). A purchase from co-trustees is equally objectionable (*x*).

or from co-
trustees.

Retiring
from trust
on pur-
pose.

(4.) Nor can a trustee be allowed to purchase the trust property, by retiring from the trust with that object in view (*y*).

Purchase
under a
decree.

(5.) Similarly it has been held that a trustee cannot purchase before the Master under a decree for sale (*z*);

From
trustee in
bank-
ruptcy.

(6.) And that he cannot purchase from the trustee in bankruptcy of his *cestui que trust*, under an agreement to divide the profits, more especially if the purchase money consists of part of the trust funds (*a*).

Fair sale
and re-
purchase.

(7.) On the contrary, where a trustee has fairly sold an estate, a subsequent *bonâ fide* purchase of the estate from the purchaser is unobjectionable (*b*).

Trust
deter-
mined and

(8.) And though a trustee cannot purchase from himself, he can purchase from a *cestui que trust* who is *sui juris*

(*s*) *Att.-Gen. v. E. of Clarendon*, 17 Ves. 491, 500; *Passingham v. Sherborne*, 9 Beav. 424.

(*t*) *Exp. Lacey*, 6 Ves. 629; *Exp. James*, 8 Ves. 348.

(*u*) *Campbell v. Walker*, 5 Ves. 678; 13 Ves. 601; *Ingle v. Richards*, 28 Beav. 361.

(*v*) *Exp. Bennett*, 10 Ves. 381,

400; *Gregory v. G.*, Coop. 204.

(*x*) *Whichcote v. Lawrence*, 3 Ves. 740.

(*y*) *Spring v. Pride*, 4 De G. J. & S. 395.

(*z*) *Cary v. C.*, 2 S. & L. 173.

(*a*) *Vaughan v. Noble*, 30 Beav. 34.

(*b*) *Baker v. Peck*, 9 W. R. 472; *ib.* 186; *Dorer v. Buck*, 5 Giff. 57.

and has discharged him from the obligation which attached upon him as trustee (*c*); but such a transaction is subjected to jealous scrutiny, and must be free from all suspicion of fraud, concealment, or undue advantage on the part of the trustee (*d*). A solicitor of a *cestui que trust* has, in general, no authority to consent to a purchase by a trustee (*e*); but a purchase has been allowed in a friendly suit by the trustees of a settlement from a surviving trustee who was a solicitor, and who acted in conduct of the purchase (*f*).

(9.) A trustee for infants, moreover, or persons under disability, may sometimes purchase the trust estate, by leave of the Court. Such *cestui que trusts* not being *sui juris* could not enter into any contract by which to release him from the character of trustee; but where an action has been commenced, and the Court has fully examined the circumstances of the case, and a trustee, saying so much is bid, offers to give more, permission may be given to the purchase (*g*).

(10.) The existence of the relation of trustee and *cestui que trust* does not affect any dealing between the parties as to property entirely unconnected with the subject of the trust (*h*).

(11.) A *cestui que trust* who wishes to set aside a sale, must apply within a reasonable time, which depends upon the circumstances of each particular case (*i*). He may lose his right to impugn the transaction by long acquiescence (*j*), such acquiescence being taken as evidence that as between the trustee and *cestui que trust* the relation had been abandoned in the transaction (*k*). And acquies-

Purchase with leave of Court.

Leave when given.

Property unconnected with the trust.

Acquiescence of *cestui que trust*.

(*c*) *Coles v. Trecothick*, 9 Ves. 234; *Exp. Lacey*, *sup.*

(*d*) See *Morse v. Royal*, 12 Ves. 355; *Franks v. Bollans*, 3 Ch. 717.

(*e*) *Downes v. Grazebrook*, 3 Mer. 209.

(*f*) *Hickley v. H.*, 2 Ch. D. 190.

(*g*) *Campbell v. Walker*, 5 Ves. 678, 682; 13 Ves. 601; *Farmer v.*

Dean, 32 Beav. 327.

(*h*) *Knight v. Marjoribanks*, 2 Mac. & G. 10.

(*i*) *Campbell v. Walker*, *sup.*

(*j*) *Morse v. Royal*, *sup.*

(*k*) *Parke v. White*, 11 Ves. 226; *Seagram v. Knight*, 3 Eq. 398; 2 Ch. 628.

cence may be evidenced by other circumstances than mere lapse of time (*l*).

Conditions
of.

In order, however, to fix acquiescence on a party, it should be unequivocally shown that he knew the fact upon which the supposed acquiescence is founded, and to which it refers (*m*). Time will in general not run against a party so long as his interest is contingent or reversionary (*n*), nor as long as he remains ignorant of his title to relief.

Confirma-
tion.

(12.) A *cestui que trust* when *sui juris* may confirm an invalid sale so that it cannot be set aside afterwards (*o*).

Condi-
tions of.

But in order to constitute a valid confirmation, a person must be aware that the act he is doing will have the effect of confirming an impeachable transaction (*p*). Nor will the confirmation be valid if done in circumstances of distress or difficulty, or under the force or pressure and influence of the previous transaction (*q*). It must, of course, be an act separate from the impeachable transaction.

2. To what persons the principle applies.

Principle
applies to
express
trustee.

(1.) The strongest case is where the would-be purchaser is an express trustee. In the principal case Mackreth was invested with the office directly by means of a trust deed, which created the relation for the express purpose of giving a power of sale; and nothing is more firmly established than that in such and such-like cases a trustee will not be suffered to purchase from himself (*r*).

Not
nominal
trustee.

A mere nominal trustee, however, for instance one who has disclaimed without ever acting in the trust, or a trustee to preserve contingent remainders, may become a purchaser (*s*).

(*l*) *Wright v. Vanderplank*, 2 K. & J. 1.

(*m*) *Randall v. Errington*, 10 Ves. 423, 428.

(*n*) *Gowland v. De Faria*, 17 Ves. 20; *Life Assoc. of Scotland v. Sidal*, 3 De G. F. & J. 58.

(*o*) *Morse v. Palmer*, 12 Ves. 353; *Roche v. O'Brien*, 1 Ba. & Be. 353.

(*p*) *Murray v. Palmer*, 2 S. & L. 486; *Thompson v. Ashbee*, 10 Ch. 15.

(*q*) *Crowe v. Ballard*, 3 Bro. C. C. 117.

(*r*) *Killick v. Flexney*, 4 Bro. C. C. 161.

(*s*) *Stacey v. Elph*, 1 My. & K. 195; *Parke v. White*, 11 Ves. 209, 226.

(2.) A mortgagee or an annuitant with a power of sale, being in fact a trustee for sale, cannot either directly or by his solicitor purchase the charged estate, except with the express authority of a *cestui que trust* who is *sui juris* (t). Mortgagee.

A mortgagee, however, does not ordinarily stand in a fiduciary position towards the mortgagor, so as to render a purchase of the equity of redemption by him from the mortgagor (u), or from a prior mortgagee selling under a power of sale (x) impracticable. Purchase of equity of redemption.

Nevertheless all transactions between a mortgagor and mortgagee are viewed with jealousy, and the sale of an equity of redemption will be set aside where, by the influence of his position the mortgagee has purchased for less than others would have given, or if there are any circumstances of misconduct in obtaining the purchase (y). The same principles apply to the case of the granting of a lease from the mortgagor to the mortgagee (z).

(3.) Executors or administrators will not be permitted, either immediately or by means of a trustee, to purchase for themselves any part of the assets, but will be considered as trustees for the persons interested in the estate, and must account to the utmost extent of the advantage made by them of the subject so purchased (a). Nor can an executor purchase a legacy from a legatee, even though a co-executor (b). So if they compound debts or mortgages, or buy them in for less than is due upon them, they may not retain any benefit out of the transaction for themselves (c). Upon the same principle a receiver cannot purchase (d). Executors and administrators.

(t) *Downes v. Grazebrook*, 3 Mer. 200; *In re Bloye's Trust*, 1 Mac. & G. 488; 3 H. L. 607, 630.

(u) *Knight v. Marjoribanks*, 2 Mac. & G. 10.

(x) *Shaw v. Bunny*, 33 Beav. 494, 2 De G. J. & S. 463.

(y) *Ford v. Olden*, 3 Eq. 461; *Prees v. Coke*, 6 Ch. 645, 649.

(z) *Ford v. Olden*, *sup.*

(a) *Hall v. Hallett*, 1 Cox, 134; *Wedderburn v. W.*, 4 My. & Cr. 41.

(b) *In re Biel's Estate*, 16 Eq. 577.

(c) *Exp. James*, 8 Ves. 337, 346.

(d) *Allen v. Bond*, 1 My. & K. 196.

Trustee in bank-
ruptcy. (4.) A trustee of a bankrupt cannot purchase his property (e). A purchase by a trustee on being found beneficial has, however, been confirmed by the Court (f). He cannot, moreover, purchase the debts of the estate, since to do so would put his duty and his interest in conflict (g). The rule applies with equal force to a commissioner of bankrupts (h).

Execution creditor may purchase. A creditor who has taken out execution is not precluded from becoming a purchaser of the property seized under it (i).

Directors and promoters of companies. (5.) There is a very large number of cases based on the trust relationship existing between the directors and shareholders of companies, which comprise a great variety of transactions regarded by the Courts as unwarrantable or suspicious. Thus—

Purchase of shares from chairman. (i.) Such directors cannot purchase shares from the chairman of the company, who is in fact their co-trustee, unless authorised so to do by the deed of settlement or constitution of the company (k).

Purchase from firm partners of a director. (ii.) Nor can a director acting for the company deal with himself or a firm in which he is a partner. If he does so he must account to the company for all the profits of such dealing (l).

Qualifying shares from intending vendor. (iii.) Persons about to become directors of a proposed company will not be allowed to accept money or to purchase shares to qualify them for office, from a person about to become a vendor to the company, and with whom it was their duty to deal as trustees for the company; such money if received will be held to belong to the company, and if it has been applied in the purchase of shares, such shares would be considered unpaid for,

(e) *Exp. Lacey*, 6 Ves. 623.

(f) *Exp. Gore*, 6 Jur. 11, 18; 7 ib. 136.

(g) *Pooley v. Quilter*, 2 De G. & J. 327.

(h) *Exp. Bennett*, 10 Ves. 381.

(i) *Stratford v. Twyman*, Jac. 418. See also *Chambers v. Waters*, 3 Sim.

42.

(k) *Hodgkinson v. The National &c. Co.*, 26 Beav. 473; De G. & J. 422; *Imperial &c. Assoc. v. Coleman*, 6 Ch. 558; 6 L. R. H. L. 189.

(l) *Flanagan v. G. W. R. Co.*, 7 Eq. 116; *Albion &c. Co. v. Martin*, 1 Ch. D. 580.

and the directors liable on the winding up of the company to be put on the list of contributories in respect of them (*m*). Where, however, directors received not money but fully paid-up shares, allotted to the vendor as consideration for the sale, although it was held that they were liable to the company for a breach of trust, they were not placed on the list of contributories in respect of the shares (*n*).

(iv.) Schedule 1, Table A., of the Companies' Act, 1862 (*o*) Companies Act, 1862, Sched. 1, Table A. provides that "the office of director shall be vacated if he hold any other office or place of profit under the company," or "if he is concerned in or participates in the profits of any contract with the company" (*p*), but it is provided that no director shall vacate his office by reason of his being a member of any company which has entered into any contracts with or done any work for the company of which he is director; he cannot, however, vote with respect to any such contract or work (*q*).

(v.) The promoters of a company are also considered to bear such a fiduciary relation to the company that profits made by them out of contracts concealed from the company cannot be retained by them (*r*). And persons who create a company to purchase property from themselves, are required faithfully to inform the company of facts which would influence the company in their decision as to the reasonableness of purchasing it. If there is any concealment the contract of sale will be set aside (*s*); but the company must in such cases apply with reasonable promptitude (*t*). Pro-motors.

(6.) An agent appointed to sell, including an auctioneer, cannot as a rule purchase from his principal unless he make it perfectly clear that he furnished his employer Agents for sale.

(*m*) *In re Canadian &c. Co., Hay's Case*, 10 Ch. 593; *McKay's Case*, 2 Ch. D. 1.

(*n*) *In re Western of Canada &c. Co.*, 1 Ch. D. 115.

(*o*) 25 & 26 Vict., c. 89.

(*p*) s. 57.

(*q*) *Ibid.*

(*r*) *Bagnall v. Carlton*, 6 Ch. D. 371.

(*s*) *New Sombrero &c. Co. v. Erlanger*, 5 Ch. D. 73.

(*t*) *Ibid.*

with all the knowledge which he himself possessed (*u*). If there be any suspicious dealing on the part of an agent, such as his purchasing in the name of a third person, the transaction will not be allowed to stand, however fair it may be in other respects (*v*).

So also an agent for sale who takes an interest in a purchase negotiated by himself, is bound to disclose to his principal the precise nature of his interest, and the burden of proving such full disclosure is on the agent (*x*).

When, however, the contract for sale has been completed and the agency determined, there is nothing then to prevent his repurchase of the property (*y*), provided there be no suspicion of fraud; but as long as the contract remains executory, the agent having power to enforce or rescind it at his pleasure, there can be no such repurchase (*z*).

Agent for
purchase.

If an agent employed to purchase, purchases for himself, he will be held a trustee for his principal (*a*), and he will not be permitted, except with the plain and express consent of his principal, to make any profit by becoming a seller to him (*b*).

Sub-
contractor.

So also if an agent employed by his principal to do work for him, *e.g.* as a sub-contractor, enters into a contract at a preposterous price, with a view to dividing the profits with the sub-contractor, the transaction will impress such profits with a trust in favour of the defrauded principal (*c*), and if an agent employed to contract, enters into any surreptitious dealings with the other contracting party, so as to cause a conflict between his duty as agent and his interest, equity will regard the transaction as fraudulent, and will not suffer the agent to retain any advantage thus gained (*d*).

(*u*) *Lowther v. L.*, 13 Ves. 95; *Olicer v. Court*, 8 Price, 127, 160.

(*v*) *Trevelyan v. Charter*, 9 Beav. 140; 11 Cl. & F. 714; *Lewis v. Hillman*, 3 H. L. 607.

(*x*) *Dunne v. English*, 18 Eq. 524.

(*y*) *Parker v. McKenna*, 10 Ch. 126.

(*z*) *Ibid.*

(*a*) *Lees v. Nuttall*, 1 R. & My. 53.

(*b*) *Kimber v. Barber*, 8 Ch. 56.

(*c*) *Holden v. Webber*, 29 Beav. 117.

(*d*) *Panama &c. Co. v. India Rubber &c. Co.*, 10 Ch. 515. See also *De Bussche v. Alt*, 8 Ch. D. 286; *Williamson v. Barber*, 9 Ch. D. 529.

The case of a stock-jobber employed to purchase, selling his own stock without his principal's knowledge, is within the principle, and will be set aside (*e*).

(7.) Upon the same principle a partner employed to Partner. purchase for the firm may not make a profit by purchasing for himself and selling to the firm (*f*). There is no rule, however, which prevents a surviving partner from purchasing the share of a deceased partner from his representatives (*g*).

(8.) The relation of solicitor and client also gives rise Solicitors. to the application of the doctrine. A solicitor employed to sell cannot purchase from his client without full disclosure (*h*); and on the other hand, if employed to purchase, he is accountable to his client for any benefits which he may have clandestinely derived from the sale (*i*).

A solicitor or other person, who has the conduct of a sale under a decree, is under an absolute incapacity to purchase thereat; and even though he may not actually have the conduct, if he is so far interested as that it is his duty to assist in procuring the best price for the property offered, he ought not to be allowed to purchase for himself (*k*); but the mere fact of his being concerned in the suit is not sufficient to incapacitate him (*l*).

A solicitor is not incapable of contracting with his client; but if such a contract is challenged a solicitor can only support it by clear proof of its fairness and of the absence of any concealment (*m*); and it is always preferable for a solicitor contemplating a purchase from his client to insist on the intervention of another legal adviser (*n*). Not incapable of contracting with client, but should generally not do so.

And although he may have ceased to act as the client's adviser, he may not use to his advantage the knowledge Even after ceasing to act as adviser.

(*e*) *Brookman v. Rothschild*, 3 Sim. 153; *Gillett v. Peppercombe*, 3 Beav. 78.

(*f*) *Bentley v. Craven*, 18 Beav. 75; *Richie v. Couper*, 28 Beav. 344.

(*g*) *Chambers v. Howell*, 11 Beav. 6.

(*h*) *Watt v. Grove*, 2 S. & L. 492.

(*i*) *Bank of London v. Tyrrell*, 27 Beav. 273; 10 H. L. 26.

(*k*) *Sidney v. Ranger*, 12 Sim. 118.

(*l*) *Guest v. Smythe*, 5 Ch. 551.

(*m*) *Pisani v. Att.-G. for Gibraltar*, 5 P. C. 516.

(*n*) *Ibid*.

of the client's affairs acquired during the continuance of the relation, and which is concealed from the client (*o*).

Counsel. The same rules apply to counsel as to solicitors (*p*), and it matters not that the adviser acted gratuitously (*q*).

Solicitor's Act, 1870. Formerly an agreement by a solicitor to receive a fixed sum for costs for business thereafter to be done was not binding on the client, who might in spite of it require a bill of costs and taxation (*r*). But by 33 & 34 Vict. c. 28, such contracts were rendered valid, subject to the provisions of the statute (*s*); and by an Act of the last session this power has been extended (*t*).

Arbitrator. (9.) An arbitrator is unable to purchase the unascertained claims of any of the parties to the reference (*u*). He has, in fact, a similar position to a judge, who cannot deliver a valid judgment in the subject-matter of which he has an interest.

Guardian and ward. (10.) Transactions between a guardian and ward during the existence of the relationship are considered invalid (*v*), and even after the ward has become of age the Court regards such dealings with suspicion (*x*). If, however, full consideration has been paid, they could not be set aside (*y*). Where a guardian bought up incumbrances on the ward's estate at an undervalue he was held trustee for the ward, and was only allowed to charge him what he actually paid (*z*).

Inclosure Commissioners. (11.) Acting on the same principle, the Legislature has rendered commissioners under the General Inclosure Act incapable of purchasing any estate in the parish in which the inclosure is made until five years after the date and execution of the award (*a*). Under the Commons' Inclosure Act a similar clause prevents valuers from purchasing land until seven years after the award (*b*).

(*o*) *Cane v. Allen*, 2 Dow. 289;

Edwards v. Meyrick, 2 Hare, 69.

(*p*) *Carter v. Palmer*, 8 Cl. & F. 657.

(*q*) *Hobday v. Peters*, 28 Beav. 349.

(*r*) *Re Newman*, 30 Beav. 196.

(*s*) ss. 4, 7—10.

(*t*) 44 & 45 Vict. c. 44, s. 8.

(*u*) *Blennerhasset v. Day*, 2 Ba. &

Be. 16.

(*v*) *Powell v. Glover*, 3 P. Wms. 251 n.

(*x*) *Grosvenor v. Sherratt*, 28 Beav. 659.

(*y*) *Hylton v. H.*, 2 Ves. Sr. 549.

(*z*) *Henley v. —*, 2 Ch. Ca. 245.

(*a*) 41 Geo. III. c. 109, s. 2.

(*b*) 8 & 9 Vict. c. 118, s. 219.

(12.) Governors and trustees of a charity cannot grant a lease to or in trust for one of themselves (e), nor insert in a lease any stipulation for their own private advantage (d). The same rule applies to a member of a corporation taking a lease of the corporate property (e).

Governors and trustees of charities.

It has been held, though difficult to reconcile with principle, that a trustee of a charity can become a mortgagee of the charity property (f).

(13.) Where no definite relationship such as those we have considered exists between the parties, yet nevertheless, if there exists a confidence between them of such a character as enables the person in whom such confidence is reposed to exert exceptional influence over the person trusting him, the Court will not allow any transaction between them to stand unless there has been full explanation and communication of every particular in the knowledge of the person who seeks to establish the contract (g). In the case referred to there was great disparity of age between the parties, and the younger was known to be in pecuniary distress. In the absence of any such relationship and of fraud, mere inadequacy of consideration will not be a sufficient reason for setting aside a sale (h), but gross inadequacy of price coupled with want of due protection and advice, precipitation in carrying out the bargain, especially when the vendor is poor and illiterate, has often been considered sufficient evidence of fraud to enable the vendor to set aside a contract (i). See *Fraud, infra*, p. 155, *et seq.*

Any relation of confidence.

3. *The nature of the relief afforded by equity.*

Nature of relief.

A *cestui que trust* (under which term are now included all persons who on the above grounds are entitled to set aside a sale) has usually a choice of two courses.

(c) *Att.-G. v. Dixie*, 13 Ves. 519, 534.

(d) *Att.-G. v. Mayor of Stamford*, 2 Swanst. 592; *Att.-G. v. Corp. of Plymouth*, 9 Beav. 67.

(e) *Att.-G. v. Corp. of Cashel*, 3 Dr. & W. 294.

(f) *Att.-G. v. Hardy*, 1 Sim. N.S.

338. But see *Forbes v. Ross*, 2 Cox, 113.

(g) *Tate v. Williamson*, 2 Ch. 55.

(h) *Harrison v. Guest*, 6 De G. M. & G. 424, 8 H. L. 481.

(i) *Longmate v. Ledger*, 2 Giff. 157; *Baker v. Monk*, 33 Beav. 419.

Option.
Recon-
veyance
with com-
pensation.

(1.) He may insist on a reconveyance of the property from the trustee who purchased it (if it remains in his hands unsold), or from a person who has purchased it from him with notice of the breach of trust (*j*). Such reconveyance will be decreed on the terms of his repaying the purchase money with interest at four per cent., and all sums which may have been expended in repairs and improvements of a permanent nature. On the other hand, there will be allowance made for all acts tending to deteriorate the value of the estate; and the trustee must account for all rents and profits received by him, and pay an occupation rent for such part of the estate as he has retained in his actual possession (*k*). In some cases, however, where sales have been set aside for actual fraud, allowance for money laid out in improvements has been refused (*l*).

Resale.

(2.) But if the *cestui que trust* does not wish for a reconveyance, an order will be made that the expense of repairs and improvements, after making allowance for deteriorating acts, shall be added to the purchase money, and that the estate shall be put up at the accumulated sum. If any one makes an advance upon that sum the trustee shall not have the estate; if not, he will be held to his purchase (*m*).

Account of
profits.

(3.) Where the trustee has resold the estate to a purchaser without notice, the *cestui que trust* can, as in the principal case, make him account for his receipts with interest.

Costs.

(4.) The costs of the suit where the sale has been set aside must be paid by the trustee (*n*), unless there has been great delay on the part of the *cestui que trust* (*o*); and where a suit has failed on account of such delay the trustee has been refused his costs (*p*).

(*j*) *York Buildings Co. v. Mackenzie*, 8 Bro. P. C. 42; *Pearson v. Benson*, 28 Beav. 598.

(*k*) *Hall v. Hallett*, 1 Cox, 134; *Campbell v. Walker*, 5 Ves. 678, 682; *Mill v. Hill*, 3 H. L. 828, 869.

(*l*) *Kennedy v. Browne*, 3 Ridg. 518.

(*m*) *Exp. Reynolds*, 5 Ves. 707; *Tennant v. Trenchard*, 4 Ch. 537, 546.

(*n*) *Sanderson v. Walker*, 13 Ves. 601.

(*o*) *Att.-G. v. Dudley*, Coop. 146.

(*p*) *Gregory v. G.*, Coop. 201.

SECTION V.—DUTIES AND LIABILITIES OF TRUSTEES.

I. *Getting in trust property, perishable property and reversions.*

Howe v. Lord Dartmouth.

II. *Custody of trust property.*III. *Investment.*IV. *Liability of Co-trustees.*

Townley v. Sherborne.

Brice v. Stokes.

In considering the position of trustees, we will first discuss their duties with respect to the trust property. And this naturally divides itself under three heads: 1st. As to the getting in of outstanding property of the trust. 2ndly. As to the custody of such property. 3rdly. As to its proper investment.

I. *Getting in Outstanding Trust Property.*

It is among the most important of the duties of a trustee to take such steps as are necessary for the security of the trust property; and the first of such steps is to get all such property into his hands, or under his control. In other words, all outstanding property must be reduced into possession.

1. (1.) Debts due to the trust must therefore, with all reasonable diligence, be collected. Money may not be left outstanding upon personal security; and it is not a sufficient reason that the debt arises from a loan made by the creator of the trust on a security which he considered sufficient (q).

They are allowed the exercise of a fair discretion, and are not expected to commence legal proceedings unnecessarily,

(q) *Powell v. Evans*, 5 Ves. 839; *Bullock v. Wheatley*, 1 Coll. 130.

nor where such proceedings would be useless (*r*), but they will not be justified in granting any great indulgence (*s*). In case a loss to the estate is occasioned by neglect of this duty, a trustee or executor will be personally answerable.

Trustee
liable for
loss by
neglect.

He may
exercise
reasonable
discretion.

(2.) But although a loss may have taken place by non-conversion of the assets by an executor, he will not be liable if the delay was caused by the exercise of a reasonable discretion; and if there be more than one executor, each one is entitled to exercise such discretion without risk, notwithstanding the opposition or difference of opinion of another (*t*).

Releasing
and com-
pounding
debts.
23 & 24
Vict. c.
145, s. 30.
44 & 45
Vict. c. 41,
s. 37.

(3.) In the exercise of a sound discretion trustees might even before 23 & 24 Vict. c. 145, release or compound a debt (*u*), and by that statute this power was confirmed and extended. Now by 44 & 45 Vict. c. 41, s. 37, executors and trustees are authorised to accept any composition, or any security real or personal, for any debt, or for any property real or personal, claimed, and may allow any time for payment of any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's estate or to the trust, and for any of those purposes to enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases and other things as seem expedient, without being responsible for any loss occasioned by anything so done in good faith.

Money
employed
in trade.

2. Money employed by a testator in trade may not be suffered to remain so invested by his executors, without express authority (*v*). Reasonable time is of course allowed for the purpose of winding up the concern; and the Court has jurisdiction in an administration suit to direct that a trade or business in which infants are interested shall be continued, and will so direct if it be for their benefit (*x*).

(*r*) *Clark v. Holland*, 19 Beav. 271.

(*s*) *Lovson v. Copeland*, 2 Bro. C. C. 156; *Caffrey v. Darby*, 6 Ves. 488.

(*t*) *Buxton v. B.*, 1 My. & Cr. 80; *Marsden v. Kent*, 5 Ch. D. 598.

(*u*) *Blue v. Marshall*, 3 P. Wms. 381; *Ratcliffe v. Winch*, 17 Beav. 216.

(*v*) *Kirkman v. Booth*, 11 Beav. 273.

(*x*) *Perry v. P.*, 3 I. R. Eq. 452.

3. Very frequently we find in a will personal property of a perishable nature bequeathed to a person for life with remainder over. In such a case the question arises whether the intention was that the first legatee should enjoy the property specifically, with the possible consequence that by the consumption or falling in of the property the remainderman will receive no benefit at all; or whether, for the equal treatment of both, the property should be sold, and the proceeds laid out on permanent investments. Conversely, reversionary property is sometimes similarly bequeathed, and the question is whether it is to remain in its existing state, with the possible consequence of its not falling into possession during the lifetime of the first tenant, so that though named as a beneficiary he will receive nothing from it, or whether again for the equal treatment of both it should be sold and invested so as to produce an immediate income.

Perishable
property
with life
interests

and rever-
sionary
property.

On these questions the case of

HOWE v. LORD DARTMOUTH

[7 Ves. 137 ; 2 W. & T. L. C. 296]

General
rule
requires
conver-
sion.

is a leading authority. From it we gather that whenever there is a general bequest of property of a wasting nature, such as long annuities or leaseholds, to persons in succession, the general rule is that it should be forthwith converted, and laid out in permanent securities; and again, that reversionary property, or property the enjoyment of which is not to commence until a future time, or until the happening of a contingency, ought to be similarly converted.

The principle is thus expressed in *Hinves v. H.* (z): "The result of the rule laid down by Lord Eldon in *Howe v. Lord Dartmouth* (a), and by Lord Cottenham in *Pickering v. P.* (b), is that where personal estate is given in terms amounting to a general residuary bequest to be enjoyed by persons in succession, the interpretation which the Court

(z) 3 Ha. 609, 611.

(a) *Supra*.

(b) 4 My. & Cr. 289.

puts upon the bequest is that the persons indicated are to enjoy the same thing in succession; and in order to effectuate that intention, the Court as a general rule converts into permanent investments as much of the personalty as is of a wasting or perishable nature at the death of the testator, and also reversionary interests."

Subject to
testator's
intention
if ascer-
tainable.

This general principle is simple enough; but like all general principles it is subject to the paramount rule that in the construction of wills the testator's intention is, if ascertainable, to prevail. He may of course direct, if he chooses, that his property, however wasting, shall be specifically enjoyed in the first place by a life tenant, and that the remainder-man shall take only what chance may leave for him; and difficulties often arise in ascertaining whether such is, or is not, the testator's intention.

What
amounts to
indication
of contrary
intention.

This question is one which evidently depends upon the language of each particular instrument, so that no general formula can be laid down for its decision. We can only illustrate from actual cases what has and what has not been considered sufficient to entitle the legatee to enjoyment of perishable property *in specie*.

Absence of
direction
to convert
does not.

The mere absence of a direction to convert the property has never been considered to mean that it should be enjoyed *in specie* (c). On the other hand, if there is a specific gift of such property, then the mere fact that trustees have a discretionary power to sell it is not a reason for converting it. The discretion is deemed to be given only for the security of the property, not with a view to vary or affect the relative rights of the legatees (d). But where there was a direction in a will that trustees should in their sole discretion sell so much and such parts of the residuary estate as they might think necessary, the Court declined to interfere with their discretion so as to prevent a tenant for life enjoying leaseholds *in specie* (e). An express direction

Court
will not
interfere
with dis-
cretion if
given.

(c) *Johnson v. J.*, 2 Coll. 441;
Morgan v. M., 14 Beav. 72, 83.

(d) *Lord v. Godfrey*, 4 Madd. 455.

(e) *Re Sewell's Estate*, 11 Eq. 80.

for sale at a given period indicates an intention that there should be no previous sale or conversion (*f*).

There has been much discussion as to whether the use of such particular words as "rents" and "dividends," in describing the proceeds of property bequeathed, amounts to a sufficient indication of intention against conversion. The result of the cases seems to be that where there is in a residuary gift a trust to pay "rents" to persons in succession, and the residue comprises no other property except leaseholds to which it is applicable, then the leaseholds are to be enjoyed *in specie* (*g*). But if the residue comprised freeholds as well as leaseholds, the word "rents" would be sufficiently accounted for without supposing it to apply to the leaseholds, and its presence would not sufficiently indicate an intention to avoid the usual rule as to their conversion (*h*).

Use of words "rents" and "dividends."

General rule.

The word "dividends" has been considered sufficient to entitle a legatee for life to the enjoyment of long annuities *in specie* (*i*). But it would not suffice to qualify an express direction to convert preceding it (*k*).

A direction that power of attorney should be given to *cestui que trusts* entitled to receive in succession the income of property, may show an intention that they should enjoy it *in specie* (*l*).

Power of attorney directed to *cestui que trust*.

A direction to divide property after the death of the tenant for life has been held to indicate a similar intention (*m*). So an exception from a general direction to convert may show an intention that long annuities are to be enjoyed *in specie* (*n*).

Direction to divide after death of tenant for life.

Where a tenant for life is entitled to the enjoyment of

Effect of

(*f*) *Alcock v. Sloper*, 2 My. & K. 699.

(*g*) *Goodenough v. Tremamondo*, 2 Beav. 512; *Vachell v. Roberts*, 32 Beav. 140; *Cafe v. Bent*, 5 Ha. 24, 36.

(*h*) *Pickup v. Atkinson*, 4 Ha. 624.

(*i*) *Alcock v. Sloper*, *sup.*

(*k*) *Bate v. Hooper*, 5 De G. M. & G. 338.

(*l*) *Neville v. Fortescue*, 16 Sim. 333.

(*m*) *Collins v. C.*, 2 My. & K. 703.

(*n*) *Wilday v. Sandys*, 7 Eq. 455.

leaseholds
enjoyable
in specie
purchased
under
compul-
sory
powers.

leaseholds *in specie*, and they are taken by a company under compulsory powers, and the purchase money paid into Court, he is entitled to the same benefit thereout as he would have had from the lease (*o*); the mere interest of the money would not be an adequate compensation (*p*). And where the tenant for life in such case outlives the term for which he was entitled as tenant for life, he will become absolutely entitled to the whole fund (*q*).

Rule
where con-
version
would re-
sult in
loss.

Where property, the subject-matter of a bequest given to persons in succession, is found by the trustees of a testator to be so laid out as to be secure, and to produce a large annual income, but is not capable of immediate conversion without loss and damage to the estate, there the rule is not to convert the property, but to set a value upon it, and to give the tenant four per cent. on such value; the residue of the income must then be invested, and the income of the investment paid to the tenant for life, the *corpus* being secured to the remainder-man (*r*). The same case decides also that when, according to the construction of a will, the executors have full power to retain certain securities as long as they think advantageous, or to invest the monies of the estate upon similar securities, while any such securities remain a part of the testator's estate, the tenant for life is entitled to the specific income arising therefrom; and also that when trustees do not convert unauthorised securities, the tenant for life will only be entitled to an income from the testator's death equal to the dividends of the consols which would have been produced by a sale and investment in consols at a year from the testator's death, and not, as in *Robinson v. R.* (*s*), to interest at four per cent. on their value.

Power of
trustees
when

Where trustees were made liable to a remainder-man for having improperly allowed perishable property to

(*o*) 8 & 9 Vict. c. 18, s. 74.

(*p*) *Jeffreys v. Connor*, 28 Beav.
328.

(*q*) *In re Beaufoy's Estate*, 1 Sm.

& G. 20.

(*r*) *Brown v. Gellatly*, 2 Ch. 751.

(*s*) 1 De G. M. & G. 247.

remain *in specie*, and to be enjoyed by the tenant for life, they were allowed by means of an inquiry in the same suit to recover back against the estate of the tenant for life the amount overpaid to him (*t*). And where trustees, having a discretion as to the time of conversion, allow reversionary property to remain unsold until it falls into possession, the tenant for life will be entitled to have paid to him in respect of interest out of the property, the amount which he would have received had the trustees sold the property at the end of one year after the testator's death (*u*).

4. Money invested on good real securities is not required to be called in, unless, of course, it is necessary for the payment of debts (*x*); and in an administration action the Court would not permit a real security to be called in without inquiry as to its expediency (*y*). It has been held that a trustee is not bound to call in a fund invested upon a second mortgage (*z*); but seeing that such a security, however apparently ample, is continually liable to damage from the operation of the doctrines of tacking and consolidation (as to which see *infra*, pp. 245—55), such investments are manifestly undesirable. If, moreover, a trustee has reason to suppose that any real security is not good, it is his duty to call it in at once (*a*).

5. It is the duty of trustees also to place the trust property beyond the power of any third parties. Thus if the trust fund is an equitable interest of which the legal estate cannot be at present transferred, the trustees must at once give notice of their interest to the person in whom the legal estate is vested, in order to avoid a subsequent purchaser gaining priority by giving the first notice (*b*). Similarly a trustee of a settlement which requires registra-

made
liable to
recover
back from
tenant for
life.

Money in-
vested on
good
security to
remain so.

Second
mortgage.

Property
in power
of third
parties.

(*t*) *Hood v. Clapham*, 19 Beav. 7 Ves. 137, 150.

90. (*z*) *Robinson v. R.*, 1 De G. M. & G. 252.

(*u*) *Wilkinson v. Duncan*, 23 Beav. 469; *Wright v. Lambert*, 6 Ch. D. 649. (*a*) *Ames v. Parkinson*, 7 Beav. 384.

(*x*) *Orr v. Newton*, 2 Cox, 276.

(*b*) *Jacob v. Lucas*, 1 Beav. 436.

(*y*) *Howe v. Earl of Dartmouth*,

tion is responsible for any loss arising from a neglect to procure registration (e).

Con-sequences of neglect to realise generally.

6. Where executors have neglected to realise outstanding assets, the *prima facie* rule is that they are liable for any loss which arises after the expiration of a year from the testator's death, and executors who have not completed the conversion by that time must be prepared to justify their delay (d). The rule, however, is not an absolute one, and if in the circumstances of any case a longer delay seemed reasonable, no liability is incurred thereby (e).

Under order of Court.

When trustees are ordered by the Court to realise securities, and they neglect to do so, they will be liable for any loss sustained by their neglect; such direction overrides their discretion (f).

Where they have special discretionary power.

On the other hand, if by the instrument creating the trust trustees are given a special discretion as to whether funds shall be called in or not, this will override the usual operation of the rule; and then, in order to charge them with loss, it will be necessary to establish a clear case of misconduct against them (g).

II. *As to the custody of Trust Property.*

General principle.

Not liable for accident,

1. The general principle is that trustees or executors are bound to take the same care of trust property as they would of their own. If a loss thereof occurs by unavoidable accident, if, for instance, without any fault of theirs it is stolen from them or from any one to whom it was properly entrusted, they are not liable (h).

2. Similarly if in the ordinary discharge of their duty they deposit assets in a bank, and the bank fails, they are

(c) *Macnamara v. Carey*, 1 I. R. Eq. 9. See also *Kingdon v. Castleman*, W. N. 1877, p. 15.

(d) *Grayburn v. Clarkson*, 3 Ch. 606; *Sculthorpe v. Tipper*, 13 Eq. 232.

(e) *Hughes v. Empson*, 22 Beav.

181.

(f) *Davenport v. Stafford*, 14 Beav. 319, 338.

(g) *Paddon v. Richardson*, 7 De G. M. & G. 563, 582.

(h) *Jones v. Lewis*, 2 Ves. sr. 240; *Job v. J.*, 6 Ch. D. 562.

not liable (*i*). In such cases, however, it is most material to inquire whether there was good reason for allowing the money so to remain. The cases quoted show that it is considered a sufficient reason if it is necessary for the ordinary purposes of the trust that a certain sum should be kept in hand, as for the payment of debts, or current expenses or legacies; or if the money is so deposited pending negotiations for its more secure investment. Such monies must remain somewhere, and in the usual course of business one would utilise a bank for the purpose. It is also similarly reasonable to allow a deposit on a sale to remain in the hands of an auctioneer (*k*).

or ordinary conduct of business.

If, however, monies be left unnecessarily in the hands of third parties, as in the hands of a banker or solicitor, more than a year after a testator's death, and after the debts and legacies are paid, and a loss occurs, the trustees or executors are liable (*l*).

Liable for risks unnecessarily incurred.

If money be handed to a solicitor to invest and he misapplies it, the trustees will be liable (*m*); or if, after having sold property, they place the conveyance executed by them in a solicitor's hands and he receives and misapplies the money (*n*).

3. A trustee who, without entirely parting with control over the trust fund, associates another person with him in its management, and so loses the exclusive power over it, will be liable for any loss which results from such a step (*o*). An illustration of this occurs where a sole trustee invests a fund in the joint names of himself and another, and so deprives himself of an unfettered discretion as to its removal (*p*).

Associating with others in control of fund,

4. A trust fund should not be left under the entire control of a co-trustee. Thus trust money should, where

or leaving it in entire control of co-trustee.

(*i*) *Johnson v. Newton*, 11 Ha. 160;
Fenwicke v. Clarke, 31 L. J. N. S.
Ch. 728.

(*k*) *Edmonds v. Peake*, 7 Beav.
239.

(*l*) *Darke v. Martyn*, 1 Beav. 525;
Castle v. Warland, 32 Beav. 660.

(*m*) *Bostock v. Floyer*, 1 Eq. 26.

(*n*) *Ghost v. Waller*, 9 Beav. 497.

(*o*) *Salway v. S.*, 2 R. & My.
215.

(*p*) *White v. Baugh*, 3 Cl. & F.
44.

there is more than one trustee, be invested or deposited in the joint names of all, and payable only to their joint order or cheque (*q*).

In the case of trust funds which consisted of stocks or securities payable to bearer, and of which the interest was payable upon coupons, it was held that a trustee might without breach of trust deposit such securities in a box at a banker's, on account of all the trustees, one being allowed to keep the key; and that on the latter misappropriating the fund, the former was not liable (*r*).

Trust property must be kept distinct.

5. It is the duty of a trustee to keep trust property distinct from his own. If he mixes them together the onus will lie upon him of distinguishing one from the other, and if he fail to do so the whole will be held to belong to the trust (*s*).

III. *As to Investment.*

Not to invest on personal security.

1. As we have seen that an executor or trustee may not suffer the trust fund to remain outstanding on personal security, though the credit may have been given by the creator of the trust, so it is clear that he is not justified in lending trust-money on personal security, even to a person to whom the creator of the trust had been accustomed so to lend money (*t*). Neither a joint personal security (*u*) nor a loan on a bond with sureties (*x*) is a proper investment.

Save with express authority.

In order to warrant investment on personal security the express authority of the creator of the trust is necessary (*y*); mere general expressions giving to trustees a discretion are not sufficient (*z*).

(*q*) *Clough v. Bond*, 3 My. & Cr. 490; *Trutch v. Lamprell*, 20 Beav. 116.

(*r*) *Mendes v. Guedalla*, 2 J. & H. 259.

(*s*) *Fellows v. Mitchell*, 1 P. Wms. 83; *Mason v. Morley*, 34 Beav. 475. See *infra*, p. 126.

(*t*) *Terry v. T.*, Prec. Ch. 273;

Darke v. Martyn, 1 Beav. 525.

(*u*) *Holmes v. Dring*, 2 Cox, 1.

(*x*) *Watts v. Girdlestone*, 6 Beav. 188.

(*y*) *Forbes v. Ross*, 2 Bro. C. C. 430; *Child v. C.*, 20 Beav. 50.

(*z*) *Pocock v. Reddington*, 5 Ves. 794; *Mills v. Osborne*, 7 Sim. 30.

Even if trustees are authorised to lend upon personal security they may not lend to one of themselves (*a*), or to a relation for the purpose of accommodating him (*b*). And any terms specified in the authority so to lend must be strictly complied with; for instance, if the consent of any person is required, or the security of a bond is directed (*c*). The term "personal security" has a wider meaning than the security of personal property. It has been held to include a loan upon mere personal credit (*d*).

Not even then to one of themselves. Authority to be strictly complied with.

2. Permission to invest in real securities does not authorise the purchase of railway mortgages or debenture stock (*e*). Nor does such permission include the security of a judgment upon lands (*f*), or upon an estate for life (*g*). Copyholds would be available (*h*), and now doubtless land held for a long term of years, if free from onerous covenants and at a pepper-corn rent (*i*), but not short leaseholds (*k*).

"Real securities." What?

Where trustees or executors are authorised to advance money upon mortgage, they should only advance two-thirds of the value of property even of a permanent value, as freehold land. A still less proportion should be advanced upon fluctuating property, such as houses and buildings, especially if used in trade (*l*). If they have had the property duly surveyed and valued by a competent person, and then *bonâ fide* and to a reasonable extent advance money thereon, they will not be liable, although eventually less may be realised than the sum advanced (*m*). Evidence of value must, however, be procured from an impartial person (*n*).

Loan on mortgage should only be to value of two-thirds.

For the reasons elsewhere given (*o*) money should not

Second mortgages.

(*a*) *Francis v. F.*, 5 De G. M. & G. 108.

(*b*) *Langston v. Ollivant*, G. Coop. 33.

(*c*) *Cocker v. Quayle*, 1 Russ. & My. 535.

(*d*) *Pickard v. Anderson*, 13 Eq. 608.

(*e*) *Mortimore v. M.*, 4 De G. & J. 472.

(*f*) *Johnston v. Lloyd*, T. J. Eq. Rep. 252.

(*g*) *Lander v. Weston*, 3 Drew, 389.

(*h*) *Wyatt v. Sharratt*, 3 Beav. 498.

(*i*) *Townend v. T.*, 1 Giff. 211; *Jones v. Chennell*, 8 Ch. D. 493, 507; *In re Boyd's Settled Est.*, 14 Ch. D. 626.

Now, see 44 & 45 Vict. c. 41, s. 65.

(*k*) *Ibid.*, *Fuller v. Knight*, 6 Beav. 209.

(*l*) *Stickney v. Sewell*, 1 My. & Cr. 8; *Budge v. Gummow*, 7 Ch. 719.

(*m*) *Jones v. Lewis*, 3 De G. & Sm. 471.

(*n*) *Norris v. Wright*, 14 Beav. 291, 301.

(*o*) P. 107 and 245—255.

Mortgage to co-trustee. be lent on a second mortgage, unless, at least, the legal estate can be promptly secured (*p*). Nor should money be lent on mortgage to a co-trustee (*q*).

Loss by solicitor's negligence. If in consequence of the ignorance or negligence of a solicitor employed by trustees to prepare a mortgage a loss occurs, the trustees must personally make it good (*r*).

Security of funds of incorporated companies. 3. A power to invest upon the security of the funds of any company incorporated by Act of Parliament will not warrant the purchase of preference railway shares (*s*). A power, however, to invest upon the stock, shares or securities of any incorporated company paying a dividend, has been held to authorise an investment in railway stock bearing a fixed rate of interest (*t*).

Statutory powers of investment. 4. Previous to certain statutes now to be referred to, a trustee's general power of investment was exceedingly circumscribed. In fact, the tenor of some cases seems such as almost to have confined him to government or bank annuities (*u*). But it is not now necessary to consider restrictions which have long been obsolete.

22 & 23 Vict. c. 35, s. 32. (1.) By 22 & 23 Vict. c. 35, s. 32 (Lord St. Leonards' Act), it is enacted that "When any trustee, executor, or administrator shall not, by some instrument creating his trust, be expressly forbidden to invest any trust fund on real securities, in any part of the United Kingdom, or on the stock of the Bank of England or Ireland, or on East India stock, it shall be lawful for such trustee, executor, or administrator, to invest such trust funds on such securities or stock; and he shall not be liable on that account as for a breach of trust, provided that such investment shall in other respects be reasonable and proper." It having been held that this section did not apply to trustees appointed by instruments executed before the passing of the Act, it has been made retrospective by 23 & 24 Vict. c. 38, s. 12.

(*p*) *Drosier v. Brereton*, 15 Beav. 221.

(*q*) *Stickney v. Sewell*, 1 My. & Cr. 8; *Macleod v. Annesley*, 10 Beav. 600.

(*r*) *Hopgood v. Parkin*, 11 Eq. 74; *Sutton v. Wilders*, 12 Eq. 373.

(*s*) *Harris v. H.*, 29 Beav. 107.

(*t*) *Consterdine v. C.*, 31 Beav. 330.

(*u*) *Hansom v. Allen*, 2 Dick. 498

(2.) Again, by a general order, made in pursuance of 23 G. O. & 24 Vict. c. 38, s. 10, on February 1st, 1861, "Cash ^{Feb. 1st, 1861.} under the control of the Court may be invested in Bank Stock, East India Stock, Exchequer Bills and $2\frac{1}{2}$ per cent. annuities, and upon mortgage of freehold and copyhold estates respectively in England and Wales, as well as in Consolidated, Reduced, and New 3 per cent. annuities." And since the making of this general order, trustees, executors, or administrators, having power to invest their trust funds upon Government securities, or upon Parliamentary stocks, funds, or securities, or any of them, may invest such trust funds or any part thereof in any of the stocks, funds, or securities, in or upon which, by such general order, cash under the control of the Court may from time to time be invested (*x*).

(3.) By 23 & 24 Vict. c. 145, s. 25 (Lord Cranworth's ^{23 & 24 Vict. c. 145, s. 25.} Act), it was enacted that trustees having trust money in their hands which it is their duty to invest at interest, should be at liberty, at their discretion, to invest the same in any of the parliamentary stocks or public funds, or in Government securities, and should also be at liberty, at their discretion, to call in any trust funds invested in any other securities than as aforesaid, and to invest the same in any such securities as aforesaid (except in the 3 per cent. Consolidated Bank annuities); and no such change of investment as aforesaid should be made where there was a person under no disability entitled in possession to receive the income of the trust fund for his life, or for a term of years determinable with his life, or for any greater estate, without the consent in writing of such person. This section has now been repealed by 44 & 45 Vict. c. 41.

(4.) Doubts having arisen as to the legal effect and signification of the words "East India Stock" in 22 & 23 Vict. c. 35, s. 32, it was by 30 & 31 Vict. c. 132, s. 1, ^{30 & 31 Vict. c. 132, s. 1.} enacted that the said words should include and express as

(*x*) 23 & 24 Vict. c. 38, s. 11.

well the East India Stock which existed previously to the 13th of August, 1859 (the date of the passing of the former Act), as East India Stock charged on the revenues of India, and created under and by virtue of any Act or Acts of Parliament passed on or after the 13th of August, 1859; and that it should be lawful for every trustee, executor, or administrator, to invest any trust fund in his possession or under his control in the stock created by the last-mentioned Act or Acts, to the same extent, and for the same purposes and objects, as he can now invest such trust fund in the East India Stock which existed previously to the 13th of August, 1859. By s. 2 of the same Act it is enacted that "it shall be lawful for every trustee, executor, or administrator, to invest any trust fund in his possession or under his control in any securities the interest of which is or shall be guaranteed by Parliament, to the same extent and in the same manner as he may invest such trust funds in such securities as aforesaid."

s. 2.

27 & 28
Vict. c.
114, s. 60.

(5.) By the Improvement of Land Act, 1864 (*x*), trustees having a power to lend on real securities are enabled (unless the contrary be provided), at their discretion, to invest their trust funds on charges under the Act or on mortgages thereof. This, however, is not retrospective.

34 Vict.
c. 27.

(6.) By the Debenture Stock Act, 1871 (*y*), it is enacted that "where a power has before the passing of this Act been or shall at any time hereafter be given to trustees (including executors, administrators, and any other persons holding funds in a fiduciary capacity) to invest trust funds in the mortgages or bonds of a railway company, or of any other description of company, such power shall, unless the contrary is expressed in the instrument creating the power, be deemed to include a power to invest such funds in the debenture stock of a railway company, or such other company as aforesaid, and an investment of trust funds in debenture stock may be made accordingly."

Effect of

These statutes have extended the number of invest-

(*x*) 27 & 28 Vict. c. 114, s. 60.

(*y*) 34 Vict. c. 27.

ments which may be utilised by trustees, in their discretion, ^{the} but they do not at all affect the principles by which that ^{statutes.} discretion must be guided, nor do they at all diminish the discretion or responsibility of trustees (z). Their investments must be such as are equally just to all objects of the trust. They may not show favour to a tenant for life by investing upon securities which command a higher rate of interest, in consequence of their being determinable; nor will the Court, in the absence of special circumstances, ^{Investments must be just to all the cestui que trusts} authorise a transfer from Consols or New 3 per cents., into another investment producing a larger income, if it may be injurious to those in remainder. The Court will, however, be influenced by facts showing it to be for the interest of children that the income of their parents should be increased (a).

5. If trustees are *expressly* bound by the terms of their trust to invest money in public funds, and instead of doing so they retain it in their hands, the *cestui que trust* may elect to charge them either with the amount of money, or with the amount of stock which they might have purchased there-with (b). An executor so retaining money will, however only be charged with simple interest at 4 per cent., unless there are circumstances showing that he has profited by his misconduct (c). If there is an express trust for accumulation, however, a trustee retaining trust funds in his hands will be charged 4 per cent. with annual rests (d). If trustees are directed to invest trust money on Government or real securities, and they do neither, the *cestui que trusts* will not be allowed the option of charging them with the monies which would have been produced by investment in the funds: they are only entitled to have the trust fund replaced with 4 per cent. interest (e). ^{Remedies against trustees.}

(z) *Consterdine v. C.*, 31 Beav. 330, 333.

(a) *Cockburn v. Peel*, 3 De G. F. & J. 170, 174.

(b) *Shepherd v. Moulds*, 4 Ha. 500, 504.

(c) *Att.-Gen. v. Alford*, 4 De G. M. & G. 843.

(d) *Knott v. Cottee*, 16 Beav. 77, 80.

(e) *Robinson v. R.*, 1 De G. M. & G. 247; cf. *Shepherd v. Moulds*, *sup.*; *Marsh v. Hunter*, 6 Mad. 295.

Trustee
may not
set off
profits
against
losses.

If there are several distinct unauthorised investments by trustees, in some of which a loss is incurred, for which the trustees are chargeable, and on others a gain, they cannot set off the gain against the loss. The *cestui que trust* may retain the gain that has been made and still claim to have the loss entirely made good (*f*).

Remedy
against
third
parties.

Where trustees have advanced trust moneys in an unauthorised manner, proceedings may be taken in Chancery to recover the moneys so advanced by a breach of trust (*g*). If, however, a trust fund fraudulently or improperly alienated gets into the hand of a third person without notice, it cannot be recovered from him, his equity being equal, and being strengthened by his legal possession (*h*). The only remedy in such cases is the personal one against the defaulting trustee.

IV. *Liability of Co-trustees.*

The case of

TOWNLEY v. SHERBORNE

[Bridg. Rep. 35; 2 W. & T. L. C. 870]

has been long referred to as a leading authority on the general liability of a trustee for the acts and defaults of his co-trustee.

BRICE v. STOKES

[11 Ves. 319; 2 W. & T. L. C. 877]

illustrates the particular case of the liability which arises from the joining of trustees in giving receipts.

General
rule
against the
liability.

The former case establishes the general principle that a trustee is not to be held liable for the acts or defaults of a co-trustee, in which he himself has not participated. As between co-executors also the same rule applies (*i*).

Excep-
tions.

There are, however, many circumstances which will take a case out of this general rule. Thus a trustee or executor

(*f*) *Robinson v. R.*, 11 Beav. 371, 375.

(*g*) *Hardy v. Met. &c. Co.*, 7 Ch. 427.

(*h*) *Thorndyke v. Hunt*, 3 De G. & J. 563.

(*i*) *Littlehales v. Gascoyne*, 3 Bro. C. C. 73.

who, though he has not participated in the act which has resulted in loss to the trust estate, has been guilty of negligence, or has stood by and been cognisant of without interfering with a devastavit or breach of trust committed by his co-trustee or co-executor, will be held responsible for it (*k*). In the latter of these cases, an executor, who took no active part in the trusts, was held liable for permitting his co-executor to retain the testator's monies in a business in which the testator had been partner with the co-executor. Both had proved the will, and having thus undertaken the duty of properly attending to the trusts were bound to diligence therein. Permitting a co-executor to receive the assets and retain them in his hands without proper investment, will also render an executor liable for any loss thus incurred: proper measures ought to be promptly taken to prevent such a breach of trust (*l*).

Still more certainly if a trustee or executor is guilty of fraud. any fraud in the matter of the trust, he will not be able to escape liability by throwing the blame on a colleague in the office.

Executors being jointly responsible for the management of the funds of their testator, questions as to liability often arise when one pays over to his co-executor, or allows him to receive the whole or part of the assets, so that he acquires an exclusive control over them, and they are afterwards lost through his misconduct. The liability in these cases depends upon circumstances. Generally, if an executor thus puts the funds into the power of his co-executor, and they are lost through his bankruptcy, or are embezzled by him, the former is liable to make good the loss (*m*). And it matters not whether this power is given by an absolute payment to a co-executor, or otherwise, as by joining him in indorsing or drawing negotiable instruments (*n*).

(*k*) *Mucklow v. Fuller*, Jac. 198 ; 356 ; *Langford v. Gascoyne*, 11 Ves. 333.
Booth v. B. 1 Beav. 125.

(*l*) *Lincoln v. Wright*, 4 Beav. 427 ; (*n*) *Hovey v. Blakeman*, 4 Ves. 608 ; *Saddler v. Hobbs*, 2 Bro. C. C.
Stiles v. Guy, 1 Mac. & G. 422.

(*m*) *Townsend v. Barber*, 1 Dick. 114.

When a co-executor may be rightly trusted.

But if, in the usual course of the management of the trust, it is necessary for an executor to pay over some of the assets to his colleague, if, for instance, one of them resides in a neighbourhood where a debt has to be paid, and money is remitted to him for that purpose by the other, the executor so remitting money incurs no liability (*o*). Nor will an executor be liable for payment over of a fund which he had no legal right to retain (*p*).

Husband of executrix liable for devastavit.

If a married woman who is executrix or administratrix commits a devastavit during the coverture, her husband will be liable for the loss (*q*), as he will be presumed to have authorised the dealings of his wife (*r*), and this, notwithstanding that she may have been living separate from him at the time (*s*). At law, formerly, in case of such devastavit, as well as of a devastavit committed before the coverture, the husband's liability entirely ceased at the wife's death, unless a judgment had already been recovered against him, or goods remained in his hand *in specie* so as to be recoverable by trover or detinue; but in equity, and now therefore in law also (*t*), the husband surviving the wife is liable to the extent of assets coming to his hands, upon the ground that all persons who come into possession of property subject to a trust, with notice of the trust, are bound by it (*u*).

At law.

Equity.

Trustees joining in receipts.

Where a trustee joins with a co-trustee in signing a receipt for trust money, it is necessary in order to estimate the liability thus arising, to inquire into the circumstances of the particular case. Every case will on examination be found to fall under one or other of the following heads.

Where it is formally necessary.

(1.) If the signature of all the trustees is formally necessary to the receipt, the signature of a trustee to whose hands the money does not come will not suffice to render

(*o*) *Bacon v. B.*, 5 Ves. 331; *Joy v. Campbell*, 1 S. & L. 341.

(*p*) *Davis v. Spurling*, 1 Russ. & My. 64.

(*q*) *Adair v. Shaw*, 1 S. & L. 213.

(*r*) *Smith v. S.* 21 Beav. 385.

(*s*) *Paget v. Read*, 1 Vern. 143.

(*t*) Jud. Act, 1873, s. 25.

(*u*) *Adair v. Shaw*, *sup.*

him liable to account for it (*x*). It is but reasonable that in a case in which he has no power to refuse to sign, his signature should not without more fix him with a liability.

And the rule as to executors is the same in similar circumstances. It is true that it is not so often necessary for a co-executor to join in a receipt or discharge for conformity's sake; but where, as in the case of a sale of stock standing in the names of executors, the concurrence of both is necessary, the one to whose hands the funds do not come will not be liable (*y*). Executors.

But in these cases where the signing is alleged to have been for mere conformity, the burden is on a trustee seeking to clear himself, to prove that his co-trustee's were the actual hands which received the money. The signature thus creates a *prima facie* liability in all cases (*z*). Burden of proof on a person signing.

Where, moreover, the transaction of which the receipt forms part is, as it was in *Brice v. Stokes* (*a*), wholly unnecessary, and the trustee signing then permits his co-trustee to deal with the monies contrary to the trust, he will be charged with any loss thus occasioned. The entire transaction being unnecessary, the fact that the mere signature was for conformity is not sufficient to discharge him (*b*). And it is the duty of a trustee to inquire as to the necessity of a transaction respecting the trust money; he may not escape by alleging ignorance of the state of the trust (*c*). Where the transaction is unnecessary.
Trustee must inquire as to the necessity.

And similarly an executor will not be justified in those cases where his formal concurrence is necessary, in joining in a transaction upon the mere representation of his co-executor that it is necessary for the purposes of administration. He must make proper inquiries; if he does not, he will be liable for any misappropriation (*d*).

(*x*) *Heaton v. Marriott*, cited Prec. Ch. 173; *Fellows v. Mitchell*, 1 P. Wms. 81.

(*y*) *Chambers v. Minchin*, 7 Ves. 186, 197.

(*z*) See *Brice v. Stokes*, 11 Ves. 319; *Fellows v. Mitchell*, *sup*.

(*a*) *sup*.

(*b*) See *Brice v. Stokes*, *sup*.; *Walker v. Symonds*, 3 Swanst. 1; *Ingle v. Partridge*, 32 Beav. 661.

(*c*) *Hanbury v. Kirkland*, 3 Sim. 265.

(*d*) *Shipbrook v. Hinchinbrook*, 11 Ves. 252, 16 Ves. 477.

Voluntary
joining in
a receipt.

(2.) Where, on the contrary, a person joins voluntarily in a receipt, in which his concurrence is not formally requisite, such interference being unnecessary, he is to be considered as assuming a power over the fund, and is therefore answerable for the application thereof, as far as it is connected with the particular transaction in which he joins (e).

Distinc-
tion be-
tween
trustees
and execu-
tors.

This difference usually distinguishes the case of receipts by executors from that of receipts by trustees. In the case of trustees it is commonly requisite that all should join in order to effect a complete discharge. They are, therefore, usually not liable for monies not coming to their hands. On the contrary, one executor being generally competent to give a valid receipt, the joining of a co-executor is as a rule unnecessary; and as a rule, therefore, executors who so sign are bound by their signatures.

Excep-
tions.

But there are exceptions to this. Where the act of signing is merely nugatory and has not the effect of putting the trust funds in the hands of a co-executor, for instance, if he has already previously received the money, such signature will not raise a liability (f). This is a very extensive exception, and reduces the rule almost to this, that the question really to be decided is whether the money was ever under the control of both executors (g).

General
conclusion.

The general conclusion, then, as to the receipts of executors seems to be, that where funds belonging to executors are not under the separate control of each, although one of them joins with his co-executor in any act or receipt which will have the effect of putting the funds into his hands, as the joining is absolutely necessary, and is not therefore evidence that the executor so joining thereby assumes a control over the fund, the principle which governs the case of trustees will be applicable, and he will not be liable, if he has used due

(e) See *Brice v. Stokes*, 11 Ves. 357.
319; *Leigh v. Barry*, 3 Atk. 584.

(f) *Westley v. Clarke*, 1 Eden. 341.
(g) *Joy v. Campbell*, 1 S. & L.

caution, for the misapplication of the fund by his co-executor (*h*).

An express clause was formerly usually inserted in trust deeds, providing that one trustee should not be answerable for the receipts, acts, or defaults of his co-trustees. Equity infused such a proviso into every trust deed, whether expressed or not (*i*), and no better right was given by the expression of that which if not expressed was implied (*k*). And now Lord St. Leonards' Act (*l*), s. 31, enacts that every instrument creating a trust shall be deemed to contain the usual indemnity and reinvestment clauses. It is no longer, therefore, necessary to introduce such clauses; and in some respects it may be deemed undesirable, since it may happen that the clause may be so framed as to receive a narrower construction than would be applied to the statute itself.

Independently also of any express indemnity, a trustee who accepts office at the request of a *cestui que trust* is entitled to be indemnified by him personally against any loss which may accrue in the proper execution of the trust: for instance, if he is made contributory on the failure of a company in which he holds shares in the character of trustee (*m*).

Remedies against trustees.

(1.) Proceedings in equity in respect of a breach of trust may be taken not only against trustees or executors but also against their representatives, even though the loss may not have occurred until after the death of such trustees (*n*), and although they may have distributed the assets without notice of the breach of trust, unless they have done so by order of the Court (*o*), or pursuant to 22 & 23 Vict. c. 35, s. 29; and the Statutes of Limitations

Indemnity clauses.

22 & 23
Vict. c. 35,
s. 31.

Generally
proceed
ings in
equity
against
trustees or
their re-
presenta-
tives.

(*h*) *Hovey v. Blakeman*, 4 Ves. 596, 608.

(*i*) *Dawson v. Clarke*, 18 Ves. 254.

(*k*) *Worrall v. Harford*, 8 Ves. 4, 8; *Rehden v. Wesley*, 29 Beav. 213.

(*l*) 22 & 23 Vict. c. 35.

(*m*) *Jervis v. Wolferstan*, 18 Eq. 18.

(*n*) *Deraynes v. Noble*, 24 Beav. 86.

(*o*) *March v. Russell*, 3 My. & Cr. 31; *Taylor v. T.*, 10 Eq. 477.

Statutes of Limitations not applicable. are no more available for the representatives than for trustees themselves (*p*). Nor will a settlor, who has covenanted to pay a sum of money and so constituted himself trustee thereof, be able to set up the statute in defence (*q*).

Effect of decree. Where several trustees are all guilty of a breach of trust, although the *cestui que trust* may have obtained a decree against them jointly, its effect is several also, and he may proceed to take out execution against any one of them alone (*r*); but as between the trustees themselves,

Contribution. any one so paying is entitled to contribution, which may in a proper case be ordered in the same suit (*s*). As between the trustees themselves the loss may be thrown primarily upon the trustee most in fault, or his estate (*t*).

Cestui que trust acquiescing in breach of trust. Where a *cestui que trust* derives any profit from a breach of trust, he will to that extent be bound to recoup the trustee (*u*); and if a *cestui que trust*, with knowledge of the fact, receives the income from an improper investment, he is bound to give credit for the difference between it and the income which would have arisen from a proper investment of the trust fund (*x*).

Bankruptcy of trustee. (2.) When a trustee becomes bankrupt, what he owes to the trust may be proved against his estate (*y*), deducting, however, the value of any beneficial interest which he himself may have in the trust estate (*z*). Although the original debt is barred when a bankrupt trustee obtains his order of discharge (*a*), nevertheless it having been the trustee's duty to prove the debt for the benefit of the *cestui que trust*, he will, if he has neglected so to do, be liable for the consequent loss, notwithstanding his discharge (*b*). The

Neglect to prove.

(*p*) *Obec v. Bishop*, 1 De G. F. & J. 137; *Butler v. Carter*, 5 Eq. 276; Jud. Act. 1873, s. 25, sub-s. 2.

(*q*) *Stone v. S.*, 5 Ch. 74.

(*r*) *Exp. Shakeshaft*, 3 Bro. C. C. 197.

(*s*) *Priestman v. Tindall*, 24 Beav. 244.

(*t*) *Fetherstone v. West*, 6 I. R.

Eq. 86.

(*u*) *Trafford v. Boehm*, 3 Atk. 440.

(*x*) *Davies v. Hodgeyson*, 25 Beav. 177.

(*y*) *Exp. Shakeshaft*, *sup.*

(*z*) *Exp. Turner*, 2 De G. M. & G. 927.

(*a*) *Exp. Holt*, 1 Deac. 248.

(*b*) *Orrett v. Corser*, 21 Beav. 52.

original debt is not indeed revived, but a fresh liability springs from the negligent breach of trust.

Where all the trustees are bankrupt, proof may be made against the estates of all, provided that not more than 20s. in the pound is recovered (*c*).

(3.) The remedy of a *cestui que trust* who is *sui juris* may be barred by his acquiescence, or concurrence, or by his executing a release (*d*). But persons under disability do not so lose their remedy unless they have by their own fraud induced the breach of trust (*e*). A married woman, however, being treated as a *feme sole* as regards her separate estate, may bind it by her concurrence in a breach of trust (*f*), unless she was either herself deceived, or under undue influence (*g*), or was restrained from anticipation (*h*).

Remedy of *cestui que trust* when barred by acquiescence, concurrence, or release.

Misrepresentation or concealment on the part of trustees will prevent their defending themselves on the ground of the *cestui que trust's* acquiescence (*i*). And mere connivance of a *cestui que trust* at a breach of trust from which he derives no benefit, will not prevent his complaining of the transaction long after he first discovered it (*k*).

Similarly the execution of a release or confirmation will not prevent his taking action unless he has full knowledge of the facts of the case (*l*) and of their legal effect (*m*).

(4.) Fraudulent breaches of trust are not only actionable but also indictable (*n*), after leave obtained from the Attorney-General or from the judge before whom any civil proceedings respecting the trust have been taken (*o*).

(*c*) *Keble v. Thompson*, 3 Bro. C. C. 112.

(*d*) See *Brice v. Stokes*, 11 Ves. 319; *Walker v. Symonds*, 3 Swanst. 1, 64.

(*e*) *Montfort v. Cadogan*, 19 Ves. 635, 639, 640; *Wilkinson v. Parry*, 4 Russ. 272, 276; *Savage v. Foster*, 9 Mod. 35.

(*f*) *Clive v. Carew*, 1 J. & H. 199.

(*g*) *Whistler v. Newman*, 4 Ves. 129.

(*h*) *Cocker v. Quayle*, 1 Russ. & My. 535.

(*i*) *Walker v. Symonds*, *sup.*

(*k*) *Phillipson v. Gatty*, 7 Hare, 516.

(*l*) *Randall v. Errington*, 10 Ves. 423.

(*m*) *Cockerell v. Cholmeley*, 1 Russ. & My. 425.

(*n*) 24 & 25 Vict. c. 96.

(*o*) *s.* 80.

SECTION VI.—REMUNERATION OF TRUSTEES.

I. *General principle.*

Robinson v. Pett.

II. *Limits of the principle.*III. *To whom it applies.*I. *General principle.*

The leading case of

ROBINSON v. PETT

[3 P. Wms. 249 ; 2 W. & T. L. C. 207]

is usually cited as establishing the rule that the Court of Chancery will not allow an executor or trustee to claim payment for his time and trouble in executing his trust, especially when an express legacy is provided for his pains.

It is a well-established principle in equity that a trustee shall not be permitted to profit by his trust, and one of the most important deductions therefrom is the rule illustrated by this case.

The acceptance of the office of trustee being optional, no hardship is occasioned by requiring that the performance of its duties shall be gratuitous ; while if remuneration was allowed, it is evident that it would be difficult if not impossible to keep it within reasonable bounds, and to prevent the frequent and excessive burdening of trust estates.

The rule thus enunciated is sufficiently simple, but in order to an adequate appreciation of its scope it is necessary to observe carefully some instances of its application to the ever-varying circumstances which occur in practice. The first inquiry will be, What are the limits of the application of the principle ? Secondly, To what persons does it extend ?

II. *What are the limits of the application of the principle?*

1. It matters not to what extent the trustee may have devoted himself to the duties of the trust, or to what extent the trust has been thereby benefited. As we shall presently see, he is entitled to be repaid pecuniary expenses actually and properly incurred, but though he may have even carried on a trade or business at a great sacrifice of time and thought, he can claim no compensation for his personal trouble or loss of time (*p*).

Extent of the trouble and of the benefit resulting immaterial.

2. Not only is a trustee not entitled to direct remuneration for time and trouble devoted to the trust, but he is not suffered by any indirect or collateral means to obtain an advantage out of his position. Two extensive classes of cases coming under this head have already been considered in dealing with constructive trusts, where we have seen that a trustee is disabled from taking advantage of his position to benefit himself by means of any dealings with the trust estate or with his *cestui que trust*. But the cases go farther than that. Thus, though the legal estate in land is vested in a trustee, it has been held that he cannot by means thereof claim the right of sporting over the land. If the sporting could be let for the benefit of the *cestui que trust*, it should be; if not, the game would belong to the heir (*q*). A trustee cannot sell his office. If he attempts to do so, any money so paid to him will be considered part of the trust fund (*r*).

Indirect or collateral benefits not allowed.

Such as sporting over trust estate.

Selling his office.

A trustee also will not in general be appointed receiver with a salary (*s*), but he may be so employed if no one else can be procured who will act with the same benefit to the estate (*t*). If he even offers to act as receiver without

Being appointed receiver with a salary.

(*p*) *Brocksopp v. Barnes*, 5 Madd. 90; *Barrett v. Hartley*, 2 Eq. 789.

(*q*) *Webb v. E. of Shaftesbury*, 7 Ves. 480, 488.

(*r*) *Sugden v. Crossland*, 3 Sm. &

G. 192.

(*s*) *Anon*, 3 Ves. 515; *Nicholson v. Tutin*, 3 K. & J. 159.

(*t*) *Sykes v. Hastings*, 11 Ves. 363, 364.

a salary, he will only be appointed on the ground that it is for the benefit of the estate, because it is the trustee's duty to see critically that the receiver does his duty (*u*).

He may
not use the
trust funds
for his
benefit.

3. Nor can a trustee utilise the trust funds in any way for his own benefit. If he improperly retains such in his own hands, even though it be not shown that he made any profit thereby, he will be charged with interest thereupon (*x*). If he employs them in any trade or adventure of his own, the *cestui que trust* may either insist on having the profits made by such trade or on having the trust fund replaced with interest (*y*). Thus if the adventure be successful the *cestui que trust* gets all the benefit; if it fail the trustee must account for the fund with interest, ordinarily at 4 per cent., but not limited thereto (*z*). Should a difficulty arise in any case as to the tracing and apportioning of the profits derived by a trustee or executor from the employment of trust funds together with his own in any trade or speculation, it may be a reason for preferring a fixed rate of interest to an account of the profits; and it seems that the usual rate in such cases would be 5 per cent. with yearly rests; *i.e.* compound interest (*a*). For further review of a trustee's liability in respect of investments see *supra*, pp. 110—116.

Such being the general doctrine in its full extent, we now inquire what allowances to trustees are not deemed to be profits within the meaning of the rule, and which, therefore, they are entitled to claim, and also what circumstances may suffice to raise exceptions to the rule.

But
trustees
are allowed
out of
pocket
expenses.

4. Trustees are allowed all proper expenses out of pocket, whether provided for in the instrument creating the trusts or not (*b*), and none the less that remuneration for their trouble has been allowed them by the author of

(*u*) *Hibbert v. Jenkins*, 11 Ves. 363, cited.

(*x*) *Pearse v. Green*, 1 J. & W. 135; *Blogg v. Johnson*, 2 Ch. 225, 229.

(*y*) *Docker v. Somes*, 2 My. & K. 655; *Townend v. T.* 1 Giff. 201.

(*z*) *Tells v. Carpenter*, 1 Madd. 290; *Forbes v. Ross*, 2 Cox, 116.

(*a*) *Jones v. Foxall*, 15 Beav. 392. But see *Emmet v. E.* 17 Ch. D. 142.

(*b*) *Hide v. Haywood*, 2 Atk. 126; *Werrall v. Harford*, 8 Ves. 4, 8.

the trusts (*c*). Thus they are allowed travelling expenses (*d*); law expenses (*e*), unless they were improper, or the litigation arose from their own fault or negligence (*f*); all necessary and proper expenses incurred in protecting the trust property, for instance, watching or opposing a bill in Parliament for that purpose (*g*); all proper outlay for the improvement of the property, with interest thereon (*h*), for paying of incumbrances thereon (*i*), or defending the title thereof (*k*). They are also entitled to be indemnified by their *cestui que trust* from any liability arising from their holding shares in his name (*l*), and from the costs of any action commenced against them in their fiduciary character or in relation to the trust estate (*m*). Properly incurred, and are entitled to indemnity for liabilities incurred.

Not only is a trustee entitled to such expenses, but he has a lien on the trust estate to secure them, which must be satisfied before the *cestui que trust* can compel a reconveyance from the trustees (*n*). Such lien has priority over the costs of a suit for the administration of the trust fund (*o*). If the trust estate no longer exists the trustees may proceed against the *cestui que trust* personally (*p*). Lien for expenses and priority.

5. Though the office of trustee, being one of personal confidence, cannot be delegated, trustees may in special cases employ agents whose expenses will be allowed out of the estate. Thus, upon making out a proper case, a trustee may employ a bailiff to manage an estate and receive the rents (*q*), even though a recompense may have been given him by the creator of the trust for his trouble (*r*). So a When agents may be employed.

(c) *Wilkinson v. W.*, 2 S. & S. 237.

(d) *Exp. Lovegrove*, 3 D. & C. 763.

(e) *Poole v. Pass*, 1 Beav. 600; *Amand v. Bradbourne*, 2 Ch. Ca. 138.

(f) *Peers v. Ceeley*, 15 Beav. 209; *Caffrey v. Darby*, 6 Ves. 488; *Malcolm v. O'Callaghan*, 3 My. & C. 52.

(g) *Bright v. North*, 2 Ph. 216.

(h) *Quarrel v. Beckford*, 1 Madd. 269, 282.

(i) *Balsh v. Higham*, 2 P. Wms. 453.

(k) *Sanders v. Hooper*, 6 Beav. 246.

(l) *James v. May*, 6 L. R. H. L. 328.

(m) *Benett v. Wyndham*, 4 De G. F. & J. 259; *Att.-Gen. v. M. of Norwich*, 2 My. & Cr. 406.

(n) *Re Exhall Coal Co.*, 35 Beav. 449.

(o) *Morison v. M.*, 7 De G. M. & G. 214, 226.

(p) *Balsh v. Higham*, *sup.*

(q) *Bonithon v. Hickmore*, 1 Vern. 316; *Stewart v. Hoare*, 2 Bro. C. C. 663.

(r) *Wilkinson v. W.*, *sup.*

solicitor or an accountant may be employed where necessary (*s*), or an agent to collect debts at a reasonable commission (*t*). But if a solicitor or other such agent is employed to do things which the trustee ought strictly to have attended to himself, his charges will not be allowed (*u*).

Remuneration may be authorised by creator of the trust.

6. It is quite open for the creator of the trust to authorise a trustee to charge for services rendered, and in doing so either to fix the amount of compensation or to leave it open. The most ordinary case of such allowances being authorised is where a solicitor is appointed trustee, with power to charge for professional services rendered. If the amount of the sum or salary to be paid in consideration of such services is specified, no question can arise; if the compensation is not so fixed a reference will be directed to settle what is a proper allowance (*v*). It appears that such authorisation may arise from implication if clear (*x*).

An annuity given to an executor for his trouble until a general settlement of the testator's affairs, was held not to cease on the institution of an administration suit (*y*); but where an annuity was given to a trustee as long as he should continue to execute the office of trustee, it was held that it ceased upon the termination of all active duties upon the payment of the whole of the trust fund to a person absolutely entitled (*z*). If such an annuity or other remuneration is authorised, and the trustee does not act, even though he be rendered incapable of so doing by the act of God, he is not entitled to receive it (*a*).

Where a solicitor is authorised to charge for professional services, this is considered only to include services strictly

(*s*) *Macnamara v. Jones*, 2 Dick. 587; *Henderson v. McIvor*, 3 Madd. 275.

(*t*) *Hopkinson v. Roe*, 1 Beav. 180; *Weiss v. Dill*, 3 My. & K. 26.

(*u*) *Harbin v. Darby*, 28 Beav. 325.

(*v*) *Ellison v. Airey*, 1 Ves. Jr. 115;

Willis v. Kibble, 1 Beav. 559.

(*x*) *Douglas v. Archbutt*, 2 De G. & J. 148.

(*y*) *Baker v. Martin*, 8 Sim. 25.

(*z*) *Hull v. Christian*, 17 Eq. 546.

(*a*) *Hanbury v. Spooner*, 5 Beav. 630; *Slaney v. Watney*, 2 Eq. 418.

professional, and not matters which an ordinary executor ought to do without the intervention of a solicitor (*b*).

7. A trustee may contract with his *cestui que trust* to receive some remuneration for acting or to make professional charges for so doing. But such a contract would be jealously watched by the Court, and would be set aside, unless it were perfectly fair, and obtained without any undue influence (*c*); and the contract must in distinct terms take the trustee out of the general rule (*d*).

Or trustee may contract for remuneration with the *cestui que trust*.

8. A trustee may also contract with the Court that he will not undertake the trust without proper compensation; and if he undertakes the trust upon the understanding that application should be made to the Court for compensation, a reference will be made to chambers to ascertain and settle what would be a reasonable allowance for his past and future services (*e*). The principle is the same as that of section 29 of the Bankruptcy Act, 1869, by which a solicitor trustee may contract for remuneration.

Or with the Court.

9. Lastly, a trustee may sometimes, from accidental circumstances, profit by his trust in a manner quite irrespective of any claim for remuneration or compensation. Where, for instance, a *cestui que trust* dies intestate and without heirs, the trustee is entitled to the benefit of any realty vested in him as such, subject to the rights of creditors of the deceased *cestui que trust*. This accidental benefit accrues to him, however, not from the strength of any title of his own, but because no other person can show any title at all (*f*). The only person who could put in any claim would be the lord or the Crown, on the ground of escheat; and in that case it was decided that where the legal estate was already vested there was no escheat, or right to compel a conveyance from the trustee.

Accidental profit accrues in some circumstances.

Lapse of real estate.

On the same principle where a mortgage in fee is made,

(*b*) *Harbin v. Darby*, *sup.*

(*c*) *Ayliffe v. Murray*, 2 Atk. 58.

432, 453; *Morrison v. M.*, 4 My. & C. 215.

(*d*) *Moore v. Frowd*, 3 My. & C. 45.

(*f*) *Burgess v. Wheate*, 1 Eden, 177.

(*e*) *Marshall v. Holloway*, 2 Swanst.

and the mortgagor dies intestate and without heirs, the equity of redemption does not escheat, but belongs to the mortgagee, subject to the mortgagor's debts (*g*). And where land is devised to trustees upon trust to convert into money for purposes which either fail or never take effect, and the testator dies without heirs, the land if unconverted, or if it has been unnecessarily converted the proceeds thereof, will belong absolutely to the trustee (*h*).

But then the trustee cannot come as plaintiff to assert his right.

No corresponding advantages in case of personal estate.

Nevertheless, in such cases the trustee cannot come into equity as plaintiff to assert his right (*i*): the Court of King's Bench, however, has by mandamus compelled an admission on the mere force of the legal title (*k*).

A trustee of personalty can reap no such advantages as those above described; since if in this case a *cestui que trust* dies intestate and without next of kin, the Crown by virtue of its prerogative can claim the chattels as *bona vacantia* (*l*).

1 Will. IV. c. 40.

Before 1 Will. IV. c. 40, where a testator made no express disposition of the residue of his personalty, the executors were at law entitled thereto; nor did Courts of equity interfere with their enjoyment, unless it appeared to be the testator's intention to exclude them from interest therein. By that Act, however, as to wills made since the 1st Sept., 1830, executors are declared to be trustees of such undisposed of residue for the next of kin under the Statute of Distributions, unless it should appear by the will that the executors were intended to take it beneficially. The onus of proving an intention in their favour is thus thrown upon them (*m*).

(*g*) *Beale v. Symonds*, 16 Beav. 406.

(*h*) *Taylor v. Haygarth*, 14 Sim. 8.

(*i*) 1 Eden. 212; *Williams v. Lonsdale*, 3 Ves. 752.

(*k*) *The King v. Coggan*, 6 East,

431.

(*l*) *Powell v. Merrett*, 1 Sm. & G. 381; *Middleton v. Spicer*, 1 Br. C. C. 201.

(*m*) *Harrison v. H.*, 2 H. & M. 237.

III.—*To what persons the doctrine applies.*

1. In *Robinson v. Pett* (*n*), under circumstances somewhat strongly in favour of allowing remuneration if possible, it was refused to one who was appointed to the office of trustee and executor, notwithstanding that he had renounced the executorship. Express trustees and executors are, therefore, seen to be most fully under the operation of the rule.

It matters not that the executor has been carrying on the business of a deceased partner (*o*), nor what his occupation or employment in life; for instance, neither a factor (*p*), nor a commission agent (*q*), nor an auctioneer (*r*), is allowed, without such authority as has been above mentioned, to make business or professional charges for work done in the execution of a trust which he has undertaken.

2. A solicitor who is appointed executor or trustee is within the rule (*s*), but this case requires special consideration.

Not only is such a solicitor personally disqualified from receiving remuneration, but it has been held that the firm to which he belongs is equally unable to charge the *cestui que trust* save for out of pocket costs and expenses (*t*), even though the business was actually attended to by a partner who was not a trustee (*u*).

There are, however, certain special limitations of the principle as applied to solicitors. Thus—

(1.) Under peculiar circumstances, for instance, in case of a protracted successful litigation which the solicitor in question was alone qualified to conduct, an inquiry was directed to give some remuneration or compensation to him (*x*).

(*n*) 3 P. Wms. 249.

(*o*) *Burden v. B.*, 1 V. & B. 170.

(*p*) *Scattergood v. Harrison*, Mos. 128.

(*q*) *Sherriff v. Axe*, 4 Russ. 33.

(*r*) *Kirkman v. Booth*, 11 Beav. 273.

(*s*) *Broughton v. B.*, 5 De G. M.

& G. 160.

(*t*) *Ibid.*

(*u*) *Christophers v. White*, 10 Beav. 523; *Lincoln v. Windsor*, 9 Ha. 158; but see *Cradock v. Piper*, 1 Mac. & G. 664.

(*x*) *Bainbrigge v. Blair*, 8 Beav. 588, 595.

Employ-
ment of
partner.

(2.) An agreement between solicitors in partnership, that the one who is appointed trustee is not to participate in any of the profits or to derive any benefit from the business done for the trusts, has been considered sufficient to admit of his partner being employed as solicitor on usual terms (*y*).

Charges
against
third
persons.

(3.) A solicitor trustee is allowed any charges or profits he may make which are not chargeable against the *cestui que trust*, but against some person with whom he deals on behalf of the trust; for instance, against a mortgagor to whom he advances the trust money on security (*z*).

Town
agent's
costs.
Mort-
gagees.

(4.) The costs of the town agent of a solicitor trustee are allowed (*a*).

3. A mortgagee with power of sale stands in a fiduciary relation with regard to the mortgagor, and so will not be allowed, either alone or conjointly with his partner in any business, *e.g.* as auctioneers, to derive any profit from the sale (*b*).

Trustee in
bank-
ruptcy.

4. The trustee of a bankrupt, who acted as solicitor to the fiat, though allowed to charge for his clerk's time employed in the business of the bankruptcy, was not allowed to make any profit thereupon (*c*). As to trustees under the Bankruptcy Act, 1869, see *supra*, II. 8, p. 129.

Agents.

5. An agent entrusted with money or any other property for the purpose of using it for the owner's benefit, cannot make any profit by the use thereof. Instances of such disqualification being considered to attach to agency are seen in the cases of a vendor of public stamps (*d*), the master of a ship (*e*), and a part-owner of or partner in a ship acting as ship's husband (*f*).

Chairman
and direc-

6. A chairman or director of a company stands in a fiduciary relation towards the company, and will not as a

(*y*) *Clack v. Carlon*, 7 Jur. N. S.

584.

411. (*z*) *Whitney v. Smith*, 4 Ch. 513.

(*d*) *Att.-Gen. v. Edmunds*, 6 Eq.

381.

(*a*) *Burge v. Brutton*, 2 Ha. 373.

(*e*) *Shallcross v. Oldham*, 2 J. & H.

609.

(*b*) *Matthison v. Clarke*, 3 Drew.

(*f*) *Miller v. Mackay*, 31 Beav.

3. (*c*) *Exp. Newton*, 3 De G. & Sm.

77.

rule be allowed to derive any profit beyond his salary from his office (*g*) ; and see also pp. 94, 95. tors of companies.

7. The principle does not apply in all its strictness to a person who is merely a constructive trustee. Though he must account for the profits of trust money employed, he will have an allowance made to him for his expenditure of time, skill, and trouble (*h*). Thus a surviving partner is in a sense a trustee for the estate of the deceased partner, but the trust is limited to the performance of the obligation. Time runs in his favour (*i*), and if he continues the business, though he must account for the profits, he is entitled to a proper allowance for the trouble of management (*k*). Constructive trustees not so strictly treated.
Surviving partner.

8. There is a marked exception from the usual rule in the case of trustees and guardians managing the estates of West Indian proprietors. By the West Indian Acts of Assembly such managers are entitled to a commission not exceeding 6 per cent. as long as they personally take care of the management and improvement of the estates committed to their charge (*l*). A mortgagee of West India estates, as long as he is out of possession, may stipulate for the consignment of the produce, and charge commission on the net produce as his compensation. But when he is in possession he stands in the same position as a mortgagee in possession in England ; and therefore, if he chooses to be consignee himself, he has no commission (*m*). Managers of West Indian estates excepted.

Formerly an executor appointed in the East Indies was entitled, on passing his accounts in this country, to a commission of 5 per cent. ; but this law is now altered, and no commission will be allowed to such an executor unless expressly given by the testator (*n*).

(*g*) *Great Luxembourg Ry. Co. v. Magnay*, 25 Beav. 586.

H. L. 318, 329.

(*h*) *Brown v. Litton*, 1 P. Wms. 140.

(*l*) *Chambers v. Goldwin*, 5 Ves. 834 ; 9 Ves. 254.

(*i*) *Knox v. Gye*, 5 L. R. H. L. 656.

(*m*) *Faulkner v. Daniel*, 3 Ha. 199, 218 ; *Leith v. Irvine*, 1 My. & K. 277.

(*k*) *Featherstonehaugh v. Fenwick*, 17 Ves. 298 ; *Vyse v. Foster*, 7 L. R.

(*n*) *Matthews v. Bagshawe*, 14 Beav. 126, and note.

CHAPTER II.

FRAUD.

Distinction between Law and Equity.

Classification of Frauds.

Chesterfield *v.* Janssen.

I. *Actual Fraud.*

1. *Arising from wrongful acts.*

Attwood *v.* Small.

2. *Arising from wrongful omissions.*

II. *Transactions deemed on general grounds inequitable.*

1. *Fraud presumed from the nature of the transaction.*

2. *Fraud presumed from the circumstances or relation of the parties.*

Huguenin *v.* Baseley.

III. *Frauds on public policy.*

Scott *v.* Tyler.

IV. *Frauds on the private rights of third persons.*

Barry *v.* Crosskey.

Savage *v.* Foster.

Aleyn *v.* Belchier.

THERE is no part of equitable jurisprudence more beneficial, and probably none of more ancient date, than its jurisdiction to give relief in circumstances of fraud. In the early days of the Court of Chancery it would seem that no cause more frequently induced suitors to seek its

assistance than the fact that it relieved against many transactions which would not have been deemed fraudulent in the Courts of Common Law.

It has never been possible to draw a precise line between those cases in which common law would give complete relief and those in which it would be necessary to resort to equity. The broad outline of the distinction may be thus expressed: In order to constitute fraud at common law, it is not enough to show that fraud in the sense of misrepresentation and undue advantage of the position of the parties said to be imposed upon has been committed, but the extent of the fraud must be brought home to the party to the action who is charged with it. A Court of equity will take into account all the circumstances of the case,—not only the act and intention of the party, but the circumstances under which the act was done, the position of the party who is said to be imposed upon, his being *inops consilii*, his being in a state of bodily and therefore mental weakness, and so on. *Non constat* that these are sufficient to constitute legal fraud (a). Since the Judicature Act, 1873 (b), it has become unnecessary to enter into this question.

Neither is it possible to formulate any definition of fraud, as that term is understood in Courts of equity, since judges have of set purpose avoided hampering themselves by laying down in general terms what shall constitute fraud. It has been said that “Fraud is infinite; and were a Court of equity once to lay down rules how far they would go, and no farther, in extending their relief against it, or to define strictly the species or evidence of it, the jurisdiction would be cramped and perpetually eluded by new schemes which the fertility of man’s invention would contrive” (c).

In the absence of any authoritative definition recognised

(a) *Stewart v. G. W. R. Co.*, 2 Dr. & Sm. 438.

(b) 36 & 37 Vict. c. 66.

(c) Parke’s *Hist. of Chanc.*, p. 508; Story, 186; *Mortlock v. Buller*, 10 Ves. 292, 306.

Fraud at
law and in
equity.

Fraud not
to be
defined.

in English equity, little purpose can be served by quoting from foreign jurists attempted definitions, which usually contain terms as much requiring explanation as the term purporting to be defined. It is by a consideration of the various classes of cases in which relief has been afforded, and by this alone, that we can arrive at a practical idea of the character of this branch of the jurisdiction. In this the memory will as usual be much assisted by a classification of the cases.

In the leading case of

CHESTERFIELD v. JANSSEN

[2 Ves. Sr. 125 ; 1 W. & T. L. C. 592]

Lord
Hard-
wicke's
classifica-
tion.

Lord Hardwicke enumerated the different species of fraud which sufficed to induce the interference of equity to the following effect :—

1. Actual fraud or *dolus malus* ; fraud arising from facts and circumstances of imposition.

2. Fraud apparent from the intrinsic nature and subject of the bargain itself ; a class comprising inequitable and unconscientious bargains generally.

3. Fraud which may be presumed from the circumstances and condition of the parties to the transaction.

4. Fraud which is so considered from circumstances of imposition on other persons not parties to the transaction.

5. Fraud which is imputed in cases of catching bargains with heirs, reversioners, or expectants in the life of the fathers, &c. ; a class of cases usually compounded of all or several of the other species of fraud, since in them there is generally either actual deception, weakness on one side and extortion on the other, or are unconscionable conditions and some deceit and illusion on other persons not privy to the agreement, such as the father or ancestor.

The last of these divisions is admittedly compounded of the others, and it will simplify the arrangement for our present purpose to treat the cases which would fall within it under the several headings to which they may be

respectively referred. Moreover, the third class of frauds here specified seems rather to be a subdivision of the second than a distinct and correlative class. We shall therefore take as the second division, inequitable and unconscientious transactions generally; of these, some being deemed fraudulent on account of their intrinsic nature or subject-matter; others, on account of the peculiar circumstances or condition of the parties.

Again, the fourth class comprises two species of transactions so distinct as to warrant the consideration of each as correlative with the other main divisions. Some transactions are deemed fraudulent as being inconsistent with the general policy of the law; others from their tendency to unfairly compromise the private rights of individuals not parties thereto. These we shall separately consider.

We are accordingly left with four leading divisions, under one or other of which all the various transactions regarded in equity as fraudulent may be classed. It will be observed that this classification does not expressly recognise the distinction often taken between actual and constructive fraud; but it will be found that those transactions which have been treated as constructively fraudulent are fully comprised in and will fall under one or other of the three last divisions. Constructive frauds, which are so called from their infringing public policy or some artificial policy of the law, are indeed markedly distinguished from frauds which are so esteemed from the proved or presumed covinous intention of the parties; but the other transactions which have been styled constructive frauds, namely frauds arising from some fiduciary relation between parties and frauds so considered because of their injurious effect on the private rights of third persons, differ from actual frauds rather in respect of the evidence by which the fraud is proved than in any substantive characteristic of the fraud itself; and at any rate the distinction is often so fine as to be, in our view, a

Division
of the
subject.

Construc-
tive
frauds.

hindrance rather than a help to a clear conception of the subject.

The entire division of the subject will then be as follows:—

I. Actual Fraud (*Dolus Malus*).

1. Arising from wrongful acts.
2. Arising from wrongful omissions.

II. Inequitable and unconscientious transactions.

1. Fraud presumed from the character or subject-matter of the transactions.
2. Fraud presumed from the circumstances or condition of the parties.
 - (1.) Contracts with persons under duress, lunatics, imbeciles, infants, &c.
Contracts between persons in fiduciary relations.
 - (2.) Gifts between parties in unequal positions.

III. Frauds so considered on grounds of public policy.

- (1.) As to marriage.
- (2.) Restraint on trade.
- (3.) Sale of offices, &c.
- (4.) Champerty.

IV. Frauds on the private rights of third persons.

- (1.) Fraudulent misrepresentations and concealments.
- (2.) Frauds on powers.

I. *Actual Fraud (Dolus Malus), arising from Facts and Circumstances of Imposition.*

Actual
fraud.
Imposi-
tion.

Fraud itself being undefinable it is useless to attempt to define actual fraud; and one does not gather much information from being told that "actual fraud is something . . . which the party must have known to be a positive fraud" (*d*).

(*d*) Smith's Manual of Equity, 56; Snell, p. 449.

The term actual fraud as here used indicates those frauds in which an attempt to impose upon the aggrieved party by some wrongful act or omission is expressly proved. We shall distinguish frauds arising from wrongful acts from those arising from wrongful omissions.

Expressly
proved.

1. *Actual Fraud arising from Wrongful Acts.*

The largest class of transactions falling under this head is that in which the fraud consists in active misrepresentation, or *suggestio falsi*.

*Suggestio
falsi.*

In the case of

ATTWOOD v. SMALL

[6 Cl. & F. 232, 444]

Lord Brougham gave expression to three rules respecting the degree of misrepresentation which would justify the rescission of a contract in equity:—

Rules in
*Attwood v.
Small.*

1. The representation must have been contrary to fact.
2. The party making it must have known it to be contrary to fact.
3. It must have given rise to the contract (*dans locum contractui*).

The first of these rules needs but little comment, since it is but a bare definition of the most essential element of misrepresentation—its falsity. It is only necessary to point out the distinction between a misrepresentation as to a fact and a mere expression of opinion. A representation which amounts only to a statement of opinion, judgment, probability, or expectation, or is merely a conjectural or exaggerated statement, is of no effect, for a man is not justified in placing reliance on it (*e*). This includes language of puffing or commendation, commonly resorted to by vendors, on which purchasers are not presumed to place reliance (*f*).

Representa-
tion
must be
false.

Express-
ions of
opinion
disting-
uished.

The second rule is subject to some exceptions. Thus, Reckless

(e) Kerr on Fraud, 39; *Haycraft* 134.
v. *Creasy*, 2 East, 92; *Jennings v.*
Broughton, 5 De G. M. & G. 126,

(f) *Fenton v. Browne*, 14 Ves.
144.

state-
ments,
or neg-
ligent
ignorance.

though a person may not know his statements to be false, this ignorance will not protect him if he has been guilty of recklessness in stating that to be a fact as to which he had no knowledge; or if he has been guilty of negligence, and is thus ignorant of that which he would have known if he had rightly discharged his duty.

That statements recklessly made in ignorance may have the same consequences as wilful deception is seen from *Reese River, &c., Co. v. Smith* (g), and *Owen v. Homan* (h). Negligent ignorance is illustrated by *Rawlins v. Wickham* (i), *Burroues v. Lock* (k), and *Slim v. Croucher* (l).

Represent-
ation
must on
reasonable
grounds be
believed to
be true.

It would thus be more strictly accurate to say that a representation false in fact, but which the person making it honestly and upon reasonable grounds believes to be true, will not, independently of a duty cast on him to know the truth, entitle the party misled to impeach the transaction as fraudulent (m). Such misrepresentations may indeed give a title to relief on the ground of mistake, as to which see *infra*, p. 184, *et seq.*

Must be
dans locum
contractui,
i.e. of a
material
fact.

Thirdly, the misrepresentation must have given rise to the contract; or, in somewhat more general terms, misrepresentation in order to justify the rescission of a contract must be as to some material fact constituting an inducement or motive to the act or omission of the other party (n). This rule excludes cases in which the misrepresentation only extends to some unimportant detail, or to something merely collateral to the contract. And it follows from it, that misrepresentation is of no effect unless it has in fact misled the person complaining of it. If he knows it to be false it cannot have influenced his conduct (o). It does not indeed suffice for

Must have
in fact
misled the
party.

(g) L. R. 4 H. L. 64, 79.

(h) 4 H. L. 997, 1035.

(i) 3 De G. & J. 304, 313.

(k) 10 Ves. 470.

(l) 1 De G. F. & J. 518, 525.

(m) *Merewether v. Shaw*, 2 Cox,

124, 134.

(n) Story, 195; *Pulsford v. Richards*, 17 Beav. 87, 96.

(o) *Nelson v. Stocker*, 4 De G. & J. 458.

the defendant to say that the plaintiff had the means of knowledge within his reach, and that by inquiry he might have ascertained the truth; for "no man can complain that another has too implicitly relied on the truth of what he has himself stated" (*p*). If, however, having such means of knowledge, the plaintiff has used them, and having made inquiries he eventually acts on his own judgment, he cannot complain of the misrepresentation (*q*).

Notwithstanding, again, that injury arises from misrepresentation, there will be no case for relief if the injury be but a remote consequence of the misrepresentation (*r*). The injury must not be a remote consequence thereof.

The result of the cases has been thus summed up:—
"A contract is voidable at the option of a party who has been induced to enter into it by a statement contrary to the fact made by the other party without reasonable grounds for believing it, though he does in fact believe it." Summary.

"A contract is not voidable on the ground of misrepresentation, if the party seeking to set it aside has made independent inquiries in the matter of the representation and acted on his own judgment" (*s*).

Another class of cases very similar to those considered under the head of misrepresentation is where the fraud consists in what has been called "active concealment;" as where a person uses some contrivance to hide a defect of something offered for sale. In every such contrivance there is fraud (*t*), provided, as in the case of misrepresentation, that the concealment has been of some material fact, and is *dans locum contractui*. Active concealment.

2. Actual Fraud arising from Wrongful Omission.

Under this head fall those cases in which fraud is imputed from the circumstance of a wrongful though passive Suppression veri.

(*p*) *Reynell v. Sprye*, 1 De G. M. & G. 656, 710; *Central Railway Co., &c., v. Kisch*, 2 L. R. H. L. 99, 120.

(*q*) *Jennings v. Broughton*, 5 De G. M. & G. 126, 140; *Dyer v. Hargrave*, 10 Ves. 505.

(*r*) *Barry v. Croskey*, 2 J. & H. 1.

(*s*) Pollock, *Contracts*, p. 464, 2nd edit.

(*t*) *Hill v. Gray*, 1 Stark, 434.

concealment, or *suppressio veri*. In certain circumstances silence may be as fraudulent and fatal as falsehood.

The first and third of the rules applied to misrepresentation in *Altwood v. Small* (u), apply equally, *mutatis mutandis*, to passive concealment. It must relate to a material fact, and must be instrumental in bringing about the contract.

But there is this further restriction, that silence will not amount to fraud unless the fact suppressed is one which the party concealing it is under some legal or equitable obligation to disclose.

Fact suppressed must be one in which confidence is reposed.

If parties are dealing at arm's length, either may avail himself of his superior knowledge without being required to disclose it to the other; the vendor may have ascertained some defect, for instance, the unproductiveness of the land of a farm which he is selling; or the purchaser may have information of something which confers on the land exceptional value, such as a mineral deposit under it; but neither is required to communicate such knowledge (x). Such cases are very different from those already referred to, in which some actual artifice or contrivance is resorted to to conceal a defect.

E.g. defects of title.

But if a vendor conceals a material fact as to which, from the nature of the case, confidence is reposed in him, the transaction may be set aside on the mere ground of his silence. Thus the concealment of an incumbrance on an estate (y), or of the death of a person on whom the title depends (z), or of other defects of title, will invalidate a transaction.

Patent and latent defects.

The distinction has been expressed as being between patent defects and latent defects. As to patent defects, or such defects as may be discovered by the exercise of ordinary vigilance, there is no duty to disclose them; each party may be reasonably required to rely on his own judg-

(u) *Sup.*, p. 139.

(x) *Fox v. Mackreth*, 2 Bro. C. C. 420; *Turner v. Harvey*, Jac. 169, 178.

(y) *Edwards v. M'Leay*, 2 Swanst. 287.

(z) *Ellard v. Llandaff*, 1 Ba. & Be. 241.

ment. Latent defects, or such as one party has no means of discovering save through the other, must be disclosed.

These rules are generally applicable, but certain contracts are, from their nature, more narrowly protected from the consequences of concealment. Specially protected contracts.

Thus in contracts of insurance, it is considered that as the insurer necessarily reposes confidence in the insured as to all facts and circumstances which are peculiarly within his own knowledge; and in marine insurance especially, not only misrepresentation but concealment of a material fact which is not a matter of general knowledge, though without any fraudulent intention, vitiates the policy; that is, makes it voidable at the underwriter's election (*a*); and the obligation to make full disclosure extends not only to facts actually known to the assured, but to facts which he ought to and with proper diligence would have known (*b*). Apart from express provisions of policies, it seems that the rule is not so strictly applied in cases of life and fire insurance (*c*). Insurance.

In the contract of suretyship, also, the duty of making full disclosure is strictly insisted on (*d*). Suretyship.

On the same principle, in family settlements, in which parties may be expected to deal in a spirit of mutual trust and confidence, full communication must be made; and if it is not, though there may have been no fraudulent motive or intent, the transaction is liable to be set aside (*e*). Family settlements.

Where also a person makes a composition with his creditors he must deal openly and equally with them all. If by misrepresentation or concealment he creates a false impression as to the amount of his property, the transaction cannot be sustained (*f*). Neither is it lawful for the debtor to permit or for any creditor to obtain any secret or undue Composition deeds.

(*a*) *Ionides v. Pender*, 9 L. R. Q. B. 531, 537; *Morrison v. Universal, &c., Co.*, 8 L. R. Ex. 197, 205.

(*b*) *Proudfoot v. Montefiore*, 2 L. R. Q. B. 511.

(*c*) *Wheelton v. Hardisty*, 8 E. & B. 232; *Sillem v. Thornton*, 3 E. & B.

868.

(*d*) See *infra*, pp. 318, *et seq.*

(*e*) *Gordon v. G.*, 3 Swanst. 400, 473, 477; *Fane v. F.*, 20 Eq. 698.

(*f*) *Vine v. Mitchell*, 1 Mood. & R. 337.

advantage. Equality between all the creditors is the very basis of composition deeds, and if there is any secret arrangement by which the concurrence of some or one of them is obtained by means of any exceptional concession, or if for any reason preference is shown, such arrangements are utterly void ; they cannot be enforced even against the assenting debtor (*g*), and any money paid under them may be recovered back (*h*).

Ratifica-
tion.

It must be remembered that in all cases of actual fraud, the defrauded party may lose all right to relief by ratification of the fraudulent act ; and this may be effected by continuing to deal with the person who has defrauded him, as well as by a formal release. But it is evident that no acts, however formal, can amount to such a ratification unless the party does them after acquiring full knowledge of the fraud and its natural consequences (*i*).

II. *Inequitable and Unconscientious Transactions.*

Sub-
division.

This is necessarily a very wide and somewhat indeterminate class, which is scarcely susceptible of systematic analysis. We may, however, approach somewhat nearer to this than we should by a mere enumeration of cases, if we separate those transactions in which the chief ground for suspecting the fraud consists in the character or peculiar subject-matter of the bargain in question, from those in which the presumption of fraud arises more especially from the peculiar circumstances or relations of the parties concerned.

1. Where fraud is presumed from the nature of the transaction.

Catching
bargains
with heirs.

Under this heading, one of the most important classes consists of transactions with expectant heirs and reversioners

(*g*) *Jackman v. Mitchell*, 13 Ves. 581.

(*h*) *Marc v. Sandford*, 1 Giff. 288.

(*i*) *Vigers v. Pike*, 8 Cl. & F. 562, 630.

respecting their future interests. These dealings do, indeed, involve the consideration of fraud on third persons, namely, the parents or predecessors in title of the heirs or reversioners in question; and at the same time a frequent ingredient in the fraud imputed is the suspicion of duress arising from the distress of the vendor, and the consequent unequal position of the parties. For these reasons Lord Hardwicke, as we have seen (*k*), included these bargains in a separate class compounded of the others. Nevertheless, for simplicity's sake, we have preferred rather to treat of them here, in consideration that the leading element of fraud in them is the suspicion attaching to the very nature of the bargains themselves.

In these cases the question is usually raised as to the effect of inadequacy of price. Now it is well established that in dealings with interests in possession mere inadequacy of price is not, generally speaking, of itself a sufficient ground for setting aside a purchase (*l*). The inadequacy may, indeed, be so gross as to amount to clear evidence of actual fraud, but to this end it must be "so strong, gross, and manifest that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it" (*m*).

A striking illustration of this is supplied by the case of *Harrison v. Guest* (*n*), where an illiterate, bedridden old man 71 years of age conveyed away without professional advice property of the value of £400 for the consideration of board and lodging during his life. He lived only six weeks afterwards; yet the inadequacy of consideration was not deemed sufficient to warrant the disturbance of the transaction.

But of dealings with reversions and expectancies equity is much more suspicious. Previously to the statute presently to be mentioned, fraud was in these cases

Complex character of these frauds.

Effect of inadequacy of consideration.

Harrison v. Guest.

Secus as to reversions before 31 Vict. c. 4

(*k*) p. 136.

(*Sc.*) 6.

(*l*) *Gwynne v. Heaton*, 1 Bro. C. C. 1, 8; *Tennent v. T.*, 2 L. R. H. L.

(*m*) *Gwynne v. Heaton*, *supra*.
(*n*) 6 De G. M. & G. 424.

commonly presumed from inadequacy of consideration (o) ; and such transactions were frequently set aside on this ground without proof of any other ingredients of fraud, such as misrepresentation, undue influence, &c. (p). And the fact that the expectant was of mature age, or well understood the nature and extent of the transaction, was immaterial (q). From the fact of a person selling such an interest, the Court presumed that he was under pecuniary pressure ; and it was not incumbent on him to prove that it was so. The *onus* was on the purchaser to show that the transaction was just and reasonable (r).

Under 31
Vict. c. 4.

By the Sales of Reversions Act (s), however, it is enacted that " no purchase made *bonâ fide*, and without fraud or unfair dealing, of any reversionary interest in real or personal estate, shall hereafter be opened or set aside merely on ground of undervalue." This Act came into operation on the 1st of January, 1868 ; but a series of decisions has clearly shown that it has not affected the jurisdiction of equity in cases of unconscientious purchases of reversions (t). In the latter case Lord Hatherley said : " The legislature has not repealed the doctrines of this Court by which protection is thrown around unwary young men in the hands of unscrupulous persons ready to take advantage of their necessities. I conceive the reason why the law as to sales of reversions was altered to be that the doctrines of this Court had been carried to an extravagant length on that subject " (u).

The effect of the statute seems to be that in future the inadequacy of consideration must be so gross as to amount to evidence of fraud ; but it has been held that the burden

(o) *Peacock v. Evans*, 16 Ves. 512.
(p) *Curwyn v. Miller*, 3 P. Wms. 293 n. ; *Aylesford v. Morris*, 8 Ch. 484 ; *Freeman v. Bishop*, Barn. Ch. R. 15 ; 2 Atk. 39.

(q) *Portmore v. Taylor*, 4 Sim. 182 ; *Bromley v. Smith*, 26 Beav. 644.

(r) *Gowland v. De Faria*, 17 Ves. 20 ; *Lord v. Jeffkins*, 35 Beav. 79.

(s) 31 Vict. c. 4.

(t) *Miller v. Cook*, 10 Eq. 641 ; *Tyler v. Yates*, 11 Eq. 265 ; 6 Ch. 665.

(u) See also *Aylesford v. Morris*, *sup.*

of proof is still on the purchaser (*x*), the circumstances of the case still rendering the Court more suspicious respecting such bargains than in case of a sale of an interest in possession.

Neither before nor since the statute has there been or is there any precise rule as to what difference between the real value and the price paid constitutes inadequacy. In Roman law it was considered that anything above half the value was a sufficient price to sustain the transaction; but in English equity it is a question of which the Court decides on the facts of the case (*y*).

In ascertaining the value of a reversion, the Court is guided by the evidence as to the market-price at the time of the transaction, rather than by the calculations of actuaries (*z*). The question is not affected by facts subsequent to the contract. Whether the reversion falls in unexpectedly soon or is unexpectedly long delayed, though of course greatly affecting its actual value in the result, is not material to the inquiry as to what was an adequate value according to everybody's knowledge at the time (*a*).

Where a sale of a reversionary interest takes place by public auction, the nature of the case supplies strong evidence that the market price has been paid (*b*). But care will be taken to ascertain that the auction has been fairly conducted. Thus if the purchaser knows that the vendor is selling under pressure, and without the usual precautions against a sacrifice of the property, it will still be incumbent on him to prove that the price given was a fair one (*c*).

Post obit bonds, or bonds conditioned for payment of a sum of money on the death of a person from whom the obligor has expectations, are on similar principles regarded

(*x*) *O'Rorke v. Bolingbroke*, 2 App. C. 814.

(*y*) *Baldwin v. Rockford*, 2 Ves. sr. 517, cited; *Nott v. Hill*, 2 Ch. Ca. 121.

(*z*) *Potts v. Curtis*, You. 543; *Wardle v. Carter*, 7 Sim. 490.

(*a*) *Gowland v. De Faria*, *sup.*

(*b*) *Shelly v. Nash*, 3 Madd. 232.

(*c*) *Fox v. Wright*, 6 Madd. 111.

with suspicion in equity, and if of an unconscionable character will be suffered only to stand as security for the actual sum lent thereon, with proper interest (*d*). And the same applies to other securities of a kindred nature.

Fraudulent
lending pre-
tence of
trading.

The ingenuity of money-lenders has often led them to disguise usurious loans to expectant heirs under the mask of trading, goods being supplied merely for the purpose of being at once re-sold. Such transactions are, however, within the reach of Courts of equity, and will be set aside upon payment of what the goods actually produced upon a re-sale, with interest (*e*).

A leading case in dealings of this kind is *King v. Hamlet* (*f*), where Lord Brougham stated that relief in these cases should be refused if either the father or other person standing *in loco parentis* to the defrauded person was aware of and did not oppose the transaction, or if the person himself so acted upon the bargain as to alter the situation of the other party or of his property, after the pressure which induced it had ceased. But these rules have been questioned by Lord St. Leonards (*g*); and it seems that the acquiescence of a father will have no more effect than to lead more or less strongly, according to the facts of the case, to the inference that a bargain so authorised was fair and innocent (*h*). The repeal of the usury laws does not affect the jurisdiction of the Court in these cases (*i*).

Terms of
relief.

In all such cases as we are considering equity proceeds on the maxim that "He who seeks equity must do equity," and only grants relief on the terms of the plaintiff paying the sum actually advanced with interest and any sums

(*d*) *Curling v. Townsend*, 19 Ves. 628; *Benyon v. Fitch*, 35 Beav. 570.

(*e*) *Waller v. Dalt*, 1 Ch. Ca. 276, 1 Dick, 8; *Barker v. Vansommer*, 1 Bro. C. C. 149.

(*f*) 2 My. & K. 456; 3 Cl. & F. 218.

(*g*) Sugd. V. & P. p. 316, 11th ed.

(*h*) *Talbot v. Stainforth*, 1 J. & H. 484, 502.

(*i*) *O'Rourke v. Polingbroke*, 2 App. C. 814; *Aylesford v. Morris*, 8 Ch. 484.

reasonably expended by the defendant in improvements, and of proper costs (*k*). Only simple interest at 5 per cent. is allowed (*l*), and a defendant will disentitle himself to costs by any improper conduct, such as refusal to accept a full sum in discharge before action brought (*m*).

Transactions originally impeachable may, moreover, be rendered valid by subsequent confirmation or acquiescence (*n*). But such confirmation or acquiescence is only effectual when it has taken place after a complete cessation of the original pressure (*o*), and with a full cognizance of the right to relief. And a transaction which is not merely voidable, but absolutely void, as were usurious contracts before 17 & 18 Vict. c. 90, and as are marriage brokage contracts still, cannot be set up by any subsequent confirmation.

Family arrangements do not come within the restrictions respecting dealings with reversionary interests, unless, of course, induced by undue influence of a parent over a child (*p*); nor do settlements made in consideration of natural affection (*q*).

2. The second and larger class of inequitable and unconscientious transactions comprises those in which the chief, or it may be the sole element of fraud, consists in the peculiar circumstances or relations of the parties concerned.

Under this head we have to deal with two very distinct classes of transactions, namely, contracts and donations or gifts, which, though to some extent subject to the same principles, are sufficiently contrasted to require separate consideration. And, first, of contracts.

(*k*) *Murray v. Palmer*, 2 S. & L. 474, 490; *Sulter v. Bradshaw*, 26 Beav. 161, 165.

(*l*) *Gowland v. De Faria*, 17 Ves. 20; *Miller v. Cook*, 10 Eq. 647.

(*m*) *Benyon v. Fitch*, 35 Beav. 570, 578.

(*n*) *Cole v. Gibbons*, 3 P. Wms. 289; *Sibbering v. Balcarras*, 3 De G. & Sm. 735.

(*o*) *Gowland v. De Faria*, *sup.*

(*p*) *Tweddell v. T.*, T. & R. 1, 13; *inf.* p. 155.

(*q*) *Shafte v. Adams*, 4 Giff. 492.

Confirmation and acquiescence.

Family arrangements excepted.

Fraud presumed from the position of the parties.

Contracts and gifts.

(1.) *Contracts.*

Contract
requires
consent
and
freedom.

The very foundation of contract is consent or agreement. There can be no true consent or agreement without a capacity to understand the terms of the agreement, and also freedom to accept or to refuse the terms proposed.

If, then, a person induces another who lacks either this capacity or this freedom, to enter into an apparent contract, however it may be fenced by formal observances, equity will not recognise the transaction; but, deeming it fraudulent, will generally grant relief against it at the suit of the party imposed upon.

Contracts
with
lunatics
and idiots;

i. Thus from their want of a capacity to understand proposals submitted to them, the contracts of idiots and lunatics, and other persons *non compotes mentis*, are generally deemed invalid in Courts of equity. In order to sustain a contract entered into with a lunatic, the person supporting it must be prepared to show the most perfect good faith, and that it was for the benefit of the lunatic. Equity will not interfere where the contract was entered into without knowledge of the incapacity and it is evident that no advantage has been taken of the weaker party (*r*); and it will follow the law in sustaining contracts for providing the lunatic with necessaries (*s*). It may be that applying the strict test of jurisprudence such contracts would be equally void with others in which there has been palpable imposition; but the practical contrast is sufficiently apparent.

with
infirm
persons;

ii. Equity will, moreover, often interfere where the person imposed upon has not suffered from such aberration of mind as amounts to insanity, but has nevertheless from old age or other infirmity been so deficient in wit as to be an easy subject of imposition and undue solicitation or influence. The burden of proving fairness of dealing with such people is on him who ventures on it, and if he fails

(*r*) *Manby v. Bewicke*, 3 K. & J. 342.

(*s*) *Nelson v. Duncombe*, 9 Beav. 211.

the transaction will be set aside, and any advantage made thereout must be disgorged (*t*).

iii. Drunkenness will in some cases invalidate a contract entered into during its influence. If, in the first place, a person has designedly contrived to draw another into intoxication for the purpose of imposing upon him while in that state, equity will interfere to prevent the enjoyment of the advantage thus fraudulently conceived. But in the absence of any such premeditated designs, equity will only interfere in cases where the drunkenness of one of the parties has been so excessive as to practically deprive him of all reason and understanding. In cases of slighter intoxication it will refuse to interfere either to enforce or to rescind the contract, being equally unwilling to assist the one person who has immorally incapacitated himself, and the other who has immorally taken advantage of the incapacity (*u*). At law it has been held that a contract made under excessive drunkenness is voidable but not void, and is therefore capable of ratification by the person when sober (*x*).

iv. In the cases above referred to the absence of the capacity to understand the proposal was the chief ground of interference. The absence of freedom to accept or reject the proposal is of like effect. The general test of what amounts to such duress or undue influence as to invalidate a contract is the question whether the party was or was not a free agent. Though there may not be actual compulsion or duress, if a person is under the influence of extreme terror, or of extreme necessity, and any advantage is taken of his position, equity will grant him relief (*y*). *A fortiori*, if the person is actually under imprisonment at the time, any dealings with him will be narrowly scrutinised in his favour (*z*).

(*t*) *Longmate v. Ledger*, 2 Giff. 157, 164.

(*u*) See *Cooke v. Clayworth*, 18 Ves. 12; *Johnson v. Medlicott*, 3 P. Wms. 130, cited note *a*.

(*x*) *Matthews v. Baxter*, 8 L. R.

Ex. 132.

(*y*) *Evans v. Llewellyn*, 1 Cox, 333, 340; *Haves v. Wyatt*, 3 Bro. C. C. 156, 158; *Boyse v. Rossborough*, 6 H. L. 2, 49.

(*z*) *Roy v. Beaufort*, 2 Atk. 190.

with
drunken
persons;

with
persons
under
duress.

Infants.

v. There is no necessity for discussing at length the contracts of infants in a work especially devoted to the exposition of the distinctive doctrines of equity, the law respecting them being now regulated by the Infants' Relief Act, 1874 (*a*), which enacts that thenceforth all contracts "entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities), and all accounts stated with infants shall be absolutely void; provided always that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable" (*b*). "No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age" (*c*).

Where, however, an infant induces persons to deal with him by falsely representing himself as of full age, he is bound in equity by payments made and acts done at his request and on the faith of such representations, and is liable to restore any advantage he has obtained by such representations to the person from whom he has obtained it (*d*). The principle is that an infant shall not take advantage of his own fraud (*e*). But in order to its application, there must have been an actual false representation, not mere dissimulation; and the party must have been in fact deceived (*f*).

It has recently been held that the Infants' Relief Act applies to trading contracts (*g*), but it expressly saves all such contracts as were not previously void-

(*a*) 37 & 38 Vict. c. 62.

(*b*) s. 1.

(*c*) s. 2.

(*d*) Pollock Contr. 35, 56, 2nd ed.

(*e*) *Overton v. Banister*, 3 Ha. 503;

Clarke v. Cobley, 2 Cox, 173.

(*f*) *Nelson v. Stocker*, 4 De G. & J. 458.

(*g*) *Exp. Jones*, 18 Ch. D. 109.

able at law. The detailed discussion of what contracts were not so voidable is a matter more appropriate to a treatise on law than to one on equity. It suffices here to state that they comprise contracts for necessities, a term which is interpreted according to the infant's degree and station in life, and contracts in other respects essentially beneficial to the infant, such as contracts of service, and of apprenticeship. The law as to infants' settlements is elsewhere treated (*h*).

vi. Many of the important distinctions between law and equity as regards the contracts of married women have been removed by the Married Women's Property Act, 1870 (*i*). This statute, and the principles of equity touching the matters not affected thereby, are fully considered elsewhere (*j*).

Married
women.

vii. A somewhat unique exception from the ordinary rules applicable to contracts is made in favour of common sailors. In consideration of their characteristic carelessness and improvidence, equity carefully scrutinises any contracts made with them respecting wages or prize money due to them, and often grants relief when it appears that undue advantage has been taken of them (*k*).

Common
sailors.

Hitherto the contracts we have been considering have come under review in connexion with the subject of fraud, on account of some absolute incapacity total or partial in one of the parties; that is to say, an incapacity not due to the existence of any particular relation between the contracting parties. The fraud imputed in these cases has usually been deemed a species of actual fraud (*l*).

viii. But there is another large class of contracts usually esteemed to come under the head of constructive fraud, in which the incapacity which raises the suspicion of fraud is wholly due to a special relation between the parties, such as that of trustee and *cestui que trust*, or solicitor and client. These cases we have fully considered

Contracts
with per-
sons under
fiduciary
relations.

(*h*) p. 396.

(*i*) 33 & 34 Vict. c. 93.

(*j*) pp. 354—6.

(*k*) *How v. Wheldon*, 2 Ves. sr. 516.

(*l*) Story, 228—243.

Constructive trusts. under the head of constructive trusts. All that was there said might with equal appropriateness have been inserted here.

It is a good illustration of the interdependence of the various branches of equitable jurisprudence that such a complete class should fall so aptly under two distinct headings. Because of its jurisdiction in, and its jealous scrutiny of all matters tainted with fraud, equity has created, for the purpose of securing even justice, an extensive class of trusts. Or, viewing the same question from the other side, we may say that in devising a remedy for cases of fraud equity has utilised the principle of trusts, which was originally designed for very different purposes.

(2.) *Gifts.*

Voluntary gifts.

Our next consideration is that of voluntary gifts or donations which are deemed fraudulent through the presumption of undue influence which is raised by the relations between the donor and donee.

These, again, might well have been dealt with under the heading of constructive trusts, the principles illustrated by the case of *Fox v. Mackreth (m)* being precisely analogous to those which now present themselves. Notwithstanding this, we have preferred to consider these cases under the head of fraud. The very separation of things so similar will perhaps serve a good purpose in emphasizing the relation of the various branches of the subject to each other; while any confusion of arrangement will be completely avoided by a careful attention to this explanation, and to the reference made under each head to the other.

What relation raises the presumption.

The first subject of inquiry respecting voluntary donations induced by fraud is as to what relationship between the parties will raise a presumption of undue influence.

One of the most frequently cited cases on this subject is

(m) p. 88.

HUGUENIN v. BASELEY.

[14 Ves. 273; 2 W. & T. L. C. 547.]

Here there was a voluntary settlement by a widow upon the defendant, who was a clergyman, and who had been appointed by her as her agent to manage her affairs. On her subsequently marrying, a bill was filed on behalf of herself and her husband praying that the settlement might be set aside, and this relief was granted on the ground that the defendant had exercised undue influence, and abused the confidence reposed in him.

The first question is, what relationship between a donor and donee is within the principle of this case.

i. Parent and child.

Donations from a child to a parent have always been jealously regarded in equity, and of course especially so when they take place but a short time after the attainment of majority. They will be set aside if it appears that any advantage has been taken of the parental authority (n); but the mere fact of the relationship will not be sufficient ground for interference when the transaction appears to be reasonable and *bonâ fide* (o); and *à fortiori* if it is of the nature of a family arrangement, as to which see p. 182. If there has been undue influence, a volunteer, or a purchaser with notice claiming through the father, is in no better position than the father himself (p).

In this, as in many other cases, a person standing *in loco parentis* is within the same rules as a parent (q). The meaning of the expression *in loco parentis* is sufficiently explained elsewhere (r).

ii. Guardian and ward.

A gift from a ward to a guardian is always suspected; and if made immediately on the ward's attaining his majority it is liable to be set aside upon the presumption of

(n) *Cocking v. Pratt*, 1 Ves. sr. 400; *Wright v. Vanderplank*, 2 K. & J. 1; 8 De G. M. & G. 133; *Turner v. Collins*, 7 Ch. 329.
(o) *Blackburn v. Edgeley*, 1 P. Wms. 600, 606; *Tendril v. Smith*,

2 Atk. 86.

(p) *Bainbridge v. Brown*, 18 Ch. D. 183.(q) *Archer v. Hudson*, 7 Beav. 551.

(r) pp. 71, 447.

Parent
and child.Person in
loco
parentis.Guardian
and ward.

undue influence (*r*). Even when a considerable time has elapsed before the gift, if undue influence can be proved, the same relief will be given (*s*). A guardian is not suffered to set up his trouble in the execution of the guardianship as a consideration for such a gift (*t*). The case against the guardian is strengthened if his accounts have not been closed, and the donation takes place while he still retains the ward's property in his hands (*u*).

But where the authority and influence of the guardian have ceased, equity will not set aside a reasonable gift made to him (*x*).

Following the analogy of the rule which considers persons *in loco parentis* as under the same restrictions as parents, the principle applies as well to a person who has assumed the office and functions of a guardian as to a guardian legally appointed (*y*).

iii. Trustee and *cestui que trust*.

Trustee,
and *cestui*
que trust.

The relationship of trustee and *cestui que trust* is within the same doctrine as fully with respect to donations as we have seen that it is with respect to contracts (*z*), and a mortgagee being a trustee for his mortgagor is included (*a*).

iv. Legal adviser and client.

Legal
adviser
and client.

A solicitor has always been disabled in equity from taking any gifts from his client, pending a suit, or at any time while the relationship subsists, beyond his proper remuneration (*b*); and a counsel has been held to be within the same rule (*c*).

v. Medical adviser and patient.

Doctor and
patient.

The relation between a doctor and his patient has been considered sufficient to support a claim for relief against a voluntary gift, on the ground of undue influence (*d*).

- | | |
|--|---|
| (<i>r</i>) <i>Eccritt v. E.</i> , 10 Eq. 405. | (<i>z</i>) pp. 88—100; <i>Barrett v. Hart-</i> |
| (<i>s</i>) <i>Hylton v. H.</i> , 2 Ves. sr. 547, | <i>ley</i> , 2 Eq. 789. |
| 549. | (<i>a</i>) <i>Ibid</i> . |
| (<i>t</i>) <i>Ibid</i> . | (<i>b</i>) <i>Tompson v. Judge</i> , 3 Drew. |
| (<i>u</i>) <i>Pierce v. Waring</i> , 1 P. Wms. | 306; <i>Morgan v. Minett</i> , 6 Ch. D. 638. |
| 121 n.; 2 Ves. sr. 549, cited. | (<i>c</i>) <i>Brown v. Kennedy</i> , 33 Beav. |
| (<i>x</i>) <i>Hatch v. H.</i> , 9 Ves. 296. | 133; 4 De G. J. & S. 217. |
| (<i>y</i>) <i>Griffin v. De Veulle</i> , 1 P. Wms. | (<i>d</i>) <i>Dent v. Bennett</i> , 4 My. & Cr. |
| 131 n.; 14 Ves. 279, cited. | 269. |

vi. Religious advisers.

The above cited case of *Huguenin v. Baseley* (e) is sufficient authority to show that a clergyman or other religious adviser is within the principle under consideration. Priest and penitent.

vii. Other relations of confidence.

The jurisdiction of equity in respect of donations under undue influence is by no means confined to cases in which there is some certain and definite relationship such as we have been considering. Any circumstances which give one person the power of exercising pressure on another may suffice to substantiate a claim for equitable relief. In fact, just as the Court has refused to define fraud itself, so it has refused to commit itself to an enumeration or description of the persons within the doctrine now in question (f). Fiduciary relations generally.

Thus a gift from an engaged lady to her suitor is liable to be carefully scrutinised, and to sustain it the gentleman must be prepared to show that it was made without undue solicitation or pressure (g). A professor of spiritualism has also been considered to stand in a position of undue authority with respect to a believer in his art, and a gift made to him has been set aside (h). The same rule has been applied in the case of a person claiming the benefit of a settlement from his deceased wife's sister on his going through the form of marriage with her (i).

The next question is, what generally amounts to undue influence; and this, again, is a matter in which no formal definition can be drawn. It is decided by the Court in its discretion on the circumstances of each particular case. But there are certain circumstances frequently found in cases of this class which weigh heavily with the Court in the exercise of this discretion, and which serve well What is undue influence?
Circumstances favouring the presumption.

(e) *Sup.* p. 155.(f) *Dent v. Bennett*, *sup.*(g) *Page v. Horne*, 11 Beav. 227; & *J.* 521.*Corbett v. Brock*, 20 Beav. 524.(h) *Lygon v. Home*, 6 Eq. 655.(i) *Coulson v. Allison*, 2 De G. F.

to illustrate the mode of reasoning on which relief is granted.

Absence of independent advice;

Thus the absence of any disinterested or professional advice on the side of the plaintiff, especially where there is a confidential relation between the parties, or considerable disparity between their powers of judgment and means of knowledge, gives rise to a strong suspicion of

false statement of consideration; absence of power of revocation; improvidence.

fraud (*k*). So also a fictitious statement of consideration is a material indication of an undue advantage having been taken (*l*). The absence of a power of revocation in a voluntary settlement (*m*), and even the mere improvidence of the transaction (*n*), are of influence in the same direction. But such circumstances as these will not, in the absence of some such relation of confidence as those above enumerated, always dispense with the necessity of the plaintiff's explicitly proving the fact of undue influence (*o*). It at least requires a strong case where no such relation exists to throw upon the donee the burden of proving the innocence of the transaction (*p*).

Duress.

A gift as well as a contract made under circumstances of duress, such as threats of prosecution or other forms of intimidation, will clearly be set aside (*q*).

Fraud prevails against volunteer claiming through the donee.

As a rule, where a gift is tainted with fraud, the transaction cannot be sustained on behalf of a third person claiming through the donee any more than by the donee himself (*r*). But it is otherwise in the case of a *bond fide* purchase from the donee without notice of the fraud. A person so acquiring the property having an equal equity with the donor, may, in accordance with the usual principle, shelter himself behind his legal title and possession (*s*).

(*k*) *Rhodes v. Bate*, 1 Ch. 252; *Dent v. Bennett*, 4 My. & Cr. 269, 273.

(*l*) *Haves v. Wyatt*, 3 Bro. C. C. 156; *Sharp v. Leach*, 31 Beav. 491.

(*m*) *Coutts v. Ackworth*, 8 Eq. 558.

(*n*) *Harvey v. Mount*, 8 Beav. 439.

(*o*) *Hunter v. Atkins*, 3 My. & K. 113; *Toker v. T.*, 31 Beav. 629.

(*p*) *Bonland v. Bradley*, 2 Sm.

& G. 339; *Hoghton v. H.*, 15 Beav. 278, 299.

(*q*) *Evans v. Llewellyn*, 1 Cox, 333, 340; *Bayley v. Williams*, 4 Giff. 638; 1 L. R. H. L. 200.

(*r*) *Bridgman v. Green*, 2 Ves. sr. 627; *Maitland v. Irving*, 15 Sim. 437.

(*s*) *Blackie v. Clark*, 15 Beav. 595; *Corbet v. Brock*, 20 Beav. 524

The consideration of undue influence employed in obtaining testamentary benefits is not within the jurisdiction of Courts of equity; but it may here be mentioned that a stronger case is required to set aside a will obtained by undue influence than is needed for the avoidance of a gift *inter vivos*. Thus a solicitor who has himself prepared a will may take a legacy therein, unless there is evidence of mistake, or of some misapprehension caused by him (*t*). In the absence of similar evidence a legacy to a Roman Catholic confessor has been sustained (*u*). In the case, however, of a bequest to a medical attendant under somewhat suspicious circumstances, it was said that the onus of proof lay heavily on him to maintain the validity of the will (*x*); and it has been laid down generally that though persuasion is not unlawful, pressure, of whatever character, if so exerted as to overpower the volition without convincing the judgment of the testator, will constitute undue influence, though no force is either used or threatened (*y*).

III. *Frauds so Considered from their Inconsistency with the Policy of the Law.*

The third species of fraud in our enumeration comprises those cases which fall under the disapprobation of equity on account of their inconsistency with general public policy, or with some artificial policy of the law. Under this head might be appropriately considered almost the whole subject of unlawful agreements; but it will here suffice to deal in detail with those only in which the Courts of equity are particularly concerned.

1. *Transactions respecting marriage.*

(1.) One important class of cases coming under this head consists of those in which the action of one or more of the

Fraud
relative to
marriage.

(*t*) *Hindson v. Weatherill*, 5 De G. M. & G. 301.

(*x*) *Ashwell v. Lomi*, 2 P. & M. 477.

(*u*) *Parfitt v. Lawless*, 2 P. & M. 462.

(*y*) *Hall v. H.* 1 P. & M. 481.

parties concerned is discountenanced on account of its mischievous interference with the policy of the law respecting marriage.

Marriage is encouraged by the law, and the marriage contract should above all others be the result of full and free consent. Generally speaking, then, transactions which tend to restrain or prevent marriage, or which tend to the deception of one or both of the parties thereto, are treated as against public policy.

Transactions in restraint of marriage are either in the form of conditions attached to voluntary gifts, or of the nature of contracts.

Conditions
in restraint
of mar-
riage.

Conditions in restraint of marriage were the subject of elaborate argument in the leading case of

SCOTT v. TYLER.

[2 Bro. C. C. 431 ; 2 Dick, 712 ; 2 W. & T. L. C. 115.]

In considering their effect, it is necessary to advert to certain consequences which spring from the fact that in dispositions of real property the Courts are guided by the principles of common law ; whereas in bequests of personalty the rules of ecclesiastical law, derived from the law of Rome, form the basis of our jurisprudence. This distinction alone accounts for the different treatment of certain conditions according to whether they appear in dispositions of real or of personal property.

Condition
precedent
or sub-
sequent.

The distinction also between conditions precedent and conditions subsequent must be observed. In the former case the estate does not vest in the beneficiary until the condition is complied with. Thus the condition opens the door to a benefit, and is therefore entitled to a favourable construction, and to support if at all reasonable. But a condition subsequent only operates after the estate has vested in the beneficiary ; and its effect being thus penal, it is to be strictly construed. The difference in effect of these two cases will best be seen by the aid of the illustration afforded by actual decisions.

First as to conditions precedent.

A condition precedent attached to a voluntary disposition of land is illustrated by cases in which a devise is made, or a portion directed to be raised out of land, on the condition of the beneficiaries marrying only with the consent of certain persons. Such a condition is valid, and no estate vests until it is complied with (*z*).

Conditions precedent.
In gifts of land.

As regards conditions precedent, moreover, the rules applicable to gifts of personalty are the same (*a*); with perhaps the single difference that in this case if consent is required, the restriction can only be applied until the attainment of a reasonable age, unless there is a gift over of the property in case of marriage at any time without consent (*b*).

In gifts of personalty.

The case of conditions subsequent is more complex. It is necessary here to distinguish between a condition imposing a particular restraint and one which would have the effect of restraining marriage generally. Whether the property concerned be real or personal, it is permissible to bestow it subject to a condition subsequent prohibiting marriage with a particular person (*c*), or with a native of a particular country (*d*), or belonging to a particular religious body (*e*); or marriage may be forbidden until the attainment of a reasonable age, which is not restricted to majority (*f*). But it seems that at least with regard to personal property the condition in this case will be considered as merely *in terrorem*, and will not be insisted on, unless there is a gift over on breach of the condition (*g*).

Conditions subsequent in particular restraint.

Conditions subsequent in general restraint of marriage attached to a gift of personal property are *primâ facie*

In general restraint of

(*z*) *Fry v. Porter*, 1 Ch. Ca. 138; 1 Mod. 300; *Harvey v. Aston*, 1 Atk. 361.

(*a*) *Scott v. Tyler*, *sup.*; *Younge v. Furze*, 8 De G. M. & G. 756.

(*b*) *Malcolm v. O'Callaghan*, 2 Madd. 349.

(*c*) *Jervis v. Duke*, 1 Vern. 19.

(*d*) *Perrin v. Lyon*, 9 East, 170.

(*e*) *Duggan v. Kelly*, 10 Ir. Eq. Rep. 295.

(*f*) *Stackpole v. Beaumont*, 3 Ves. 89; *Younge v. Furze*, *sup.*

(*g*) See note to *Harvey v. Aston*, 1 Atk. 380; *W. v. B.*, 11 Beav. 621; *Poole v. Bott*, 11 Ha. 33; *Marples v. Bainbridge*, 1 Madd. 590; *Jones v. J.*, 1 Q. B. D. 279.

gifts of
personalty.

void, and the gift remains unaffected thereby. An instance of this is where a testator makes a bequest to a legatee with a direction that in case of his or her marriage the property shall pass to another (*g*). And the same rule applies in the case of a mixed fund, and also it seems to a legacy to be raised by the conversion of land (*h*). The fact that there is a gift over will not in any of these cases save the condition.

Limitation
over on
marriage.

But, nevertheless, where the gift is to a woman, and the intention of the donor appears to be not to restrain marriage, but merely in good faith to make a provision for her as long as she remains single, a limitation of personal property until marriage has been sustained (*i*). The distinction of principle between these two cases is clear enough, though its application may on the facts often be difficult.

In gifts of
real estate.

A condition subsequent in general restraint of marriage, attached to a gift of real estate, is, it seems, valid (*k*); *à fortiori* if in this case, the intention appears to be to create a provision for a woman until marriage (*l*).

Second
marriages
not within
the rule.

It must be observed that conditions in general restraint of marriage are always valid in gifts to widows, and are indeed matters of every-day occurrence (*m*); and this not only in the case of a bequest by a testator to his own widow, but also in a gift to the widow of another person (*n*). A gift over on the second marriage of a man has also been sustained (*o*).

Contracts
in restraint
of mar-
riage.

(2.) Contracts in restraint of marriage are, on the same principles as conditions to that effect, considered fraudulent and void.

(*g*) *Monley v. Rennoldson*, 2 Ha. 570.

(*h*) *Bellairs v. B.*, 18 Eq. 510;
Lloyd v. L., 2 Sim. N. S. 255

(*i*) *Webb v. Grace*, 2 Ph. 701;
Heath v. Lewis, 3 De G. M. & G. 954.

(*k*) *Harvey v. Aston*, 1 Atk. 380.
note.

(*l*) *Jones v. J.*, 1 Q. B. D. 279.

(*m*) *Craven v. Brady*, 4 Eq. 209; 4 Ch. 206.

(*n*) *Charlton v. Coombes*, 11 W. R. 1038; *Newton v. Marsden*, 2 J. & H. 356.

(*o*) *Allen v. Jackson*, 1 Ch. D. 399.
For a concise summary of these rules respecting conditions, see Pollock on Contracts, p. 307, 2nd ed.

Thus where a woman gave a bond conditioned to be paid in case she married again, it was on her marriage ordered to be delivered up (*p*).

Similarly a contract to marry a particular person who is not bound by a corresponding obligation is invalid as opposed to public policy (*q*). A contract by which persons are mutually bound to marry is valid at law (*r*), but will be set aside in equity if it amounts to a fraud upon a parent or person *in loco parentis*, as in *Woodhouse v. Shepley* (*s*), where the father of the lady was known to be opposed to the match, and the suitors clandestinely entered into mutual bonds to marry each other after his death, under a penalty of £600. Contracts to marry, frauds on parents, &c.

Transactions also known as marriage brokage contracts, in which a person undertakes for a stipulated reward to bring about a certain marriage, are void as frauds upon public policy, and as necessarily involving the deception of one of the parties to the marriage or of the parents (*t*). Such contracts being void are incapable of confirmation (*u*), are void, and money paid thereunder may, it seems, be recovered back (*x*). Marriage brokage contracts

On the same principle every contract by which a parent or guardian seeks to obtain any remuneration for promoting or consenting to the marriage of his child or ward is void (*y*). And generally all contracts upon a treaty of marriage which tend to deceive or mislead one of the parties to it or their relatives are deemed fraudulent and void. Thus a security given by a son without the privity of his parents to return part of the portion of his wife was held to be invalid (*z*); and where a man, on the treaty for the marriage of his sister, lent her money, in order to increase her so contracts tending to deceive one of the parties.

(*p*) *Baker v. White*, 2 Vern. 215.
 (*q*) *Key v. Bradshaw*, 2 Vern. 102.
 (*r*) *Cock v. Richards*, 10 Ves. 429, 438.
 (*s*) 2 Atk. 535.
 (*t*) *Roberts v. R.*, 3 P. Wms. 65, 76; *Hall v. Thynne*, 9 Show. P. C.

76.
 (*u*) *Cole v. Gibson*, 1 Ves. sr. 503.
 (*x*) *Smith v. Bruning*, 2 Vern. 392.
 (*y*) *Keat v. Allen*, 2 Vern. 588; *Hamilton v. Mohun*, *ib.* 652.
 (*z*) *Turton v. Benson*, 1 P. Wms. 496.

apparent portion, and she gave a bond for its repayment, this bond was decreed to be given up (*a*). In such transactions as these, relief will be given even on the suit of a *particeps criminis*, the public interest causing a departure from the usual rule that a plaintiff in equity must come with clean hands.

Attempts
to separate
husband
and wife.

(3.) With equal or greater reason any attempts to effect a separation between a husband and wife through the means of a conditional gift, are discountenanced. If a bequest is made on condition of such a separation, the condition is absolutely void, and the bequest remains unfettered (*b*). In a much more recent case, where an annuity was conditioned on a married woman continuing to live apart from her husband, the Court refused to give effect to the condition after a reconciliation had taken place (*c*).

Agree-
ments to
influence
testators.

2. On a somewhat analogous principle, agreements to use influence with a testator in favour of a particular person or object are considered void (*d*); though a man may validly bind himself by contract to make a particular testamentary disposition (*e*).

Contracts
in restraint
of trade.

3. Another class of transactions void as contravening the policy of the law are contracts in general restraint of trade. This part of the subject does not indeed present for consideration any principles distinctively equitable, the Courts of law having long been as jealous as those of equity of any agreement tending to promote monopolies or discourage industry and just competition (*f*). Equity also recognises the same exceptions as prevailed at law, to the effect that special and limited restraints are lawful; for instance a restraint against carrying on business at a particular place or within a defined area, or with certain

(*a*) *Gale v. Lindo*, 1 Vern. 475.

(*b*) *Tennant v. Brail*, Toth. 141;
Brown v. Peck, 1 Ed. 140.

(*c*) *Wren v. Bradley*, 2 De G. & Sm. 49.

(*d*) *Dobenham v. Ox*, 1 Ves. sr. 276.

(*e*) *De Beil v. Thomson*, 3 Beav.

469; 12 Cl & F. 45; *Loffus v. Maw*, 3 Giff. 592.

(*f*) See *Bunn v. Grey*, 4 East, 190; *Mumford v. Gething*, 7 C. B. (N. S.) 305, and the leading authority of *Mitchel v. Reynolds*, 1 P. Wms. 181; 1 Sm. L. C. 406.

specified persons, or for a limited time. In all such cases the Court will judge of the reasonableness or otherwise of the restriction, and support or subvert the contract accordingly. Similarly a person may sell the secret of a particular process of business and restrain himself from using it in future (*g*).

4. Another class of transactions which here invites attention comprises those discountenanced on account of their tendency to interfere with the proper administration of government and of justice. Agreements to corrupt or improperly to influence any officer of State, whether executive or judicial, are obviously void; and so suspicious is the law of everything which threatens danger of this kind, that any agreements which have an apparent tendency in that direction are equally held void, though an intention to use unlawful means be disclaimed (*h*).

Similarly, apart from the provisions of statutes which are very comprehensive in their extent, agreements for the buying, selling, or procuring of public offices are wholly void as well at law as in equity (*i*).

As to assignments of salaries, pensions, &c., and agreements savouring of maintenance or champerty, see "Mortgages," sect. V., IV., 5, p. 313.

IV. *Frauds on Third Persons.*

The last species of fraud which remains to be considered comprises frauds so considered from their inequitable interference with the private rights of third persons not parties to the fraudulent transaction.

These are of two classes: first, where such third person is deceived by the misrepresentation or concealment of

(*g*) *Bryson v. Whitehead*, 1 S. & S. 74; *Harms v. Parsons*, 32 Beav. 328. See generally Pollock on Contracts, 309—317, 2nd ed.

(*h*) Pollock Cont. 286, 2nd ed.;

Egerton v. Brownlow, 4 H. L. 1—250.

(*i*) *Harrington v. De Chastel*, 2 Swanst. 159 n.; *Hartwell v. H.*, 4 Ves. 811.

one of the parties to the transaction: secondly, the fraudulent exercise of powers for purposes other than those intended by the donor of the power.

1. *Deception of Third Persons.*

Deception
of third
person

The consideration of this subject brings before us again questions very similar to those dealt with under the first head, or actual fraud; and generally speaking the characteristics of misrepresentation and concealment there exhibited are equally applicable here. There are, however, some important cases touching the particular application of them in the circumstances now under view, to which it behoves us to advert.

by fraudu-
lent mis-
represen-
tation.

Both misrepresentation and concealment may be treated as fraudulent, not only by a party to the transaction who is deceived, but also in some circumstances by third parties who suffer thereby.

As to misrepresentation as affecting third parties, the following rules were laid down by Lord Hatherley in

Rules in
Barry v.
Crosskey.

BARRY v. CROSSKEY.

[2 J. & H. 1, 22.]

(1.) "Every man must be held responsible for the consequences of a false representation made by him to another, upon which a third person acts, and so acting is injured or damnified—provided it appear that such false representation was made with the intent that it should be acted upon by such third person in the manner that occasions the injury or loss."

(2.) "The injury must be the immediate and not the remote consequence of the representation thus made" (*l*).

By con-
cealment.

As to concealment as injuriously affecting third parties, a leading authority is

Savage v.
Foster.

SAVAGE v. FOSTER

[9 Mod. 35; 2 W. & T. L. C. 620]

which decided that a person knowing his own title, and

(*l*) Pollock Contracts, 484, ed. 2; *Att.-G. v. Ray*, 9 Ch. 397.

not giving notice of it to a purchaser, could not be allowed to set it up against the purchaser; and that the coverture of the person was no protection to the transaction.

In this case a married woman, knowing herself to be tenant in tail of property subject to her mother's life interest, upon the marriage of her half-sister, induced her mother to convey the lands to her for life, with remainder to the intended husband in fee. The husband under this title, and with no notice of the tenancy in tail, sold to a *bond fide* purchaser. It was held that the married woman could not set up her title against the purchaser, and that her right was extinguished.

In this case there was active interposition to induce the conveyance; but the same principle has been applied where a person has simply stood by and permitted others to deal with the property in a manner inconsistent with his rights. If knowing of such a transaction, he does not give the purchaser notice, he cannot afterwards avoid the purchase (*m*).

So, if upon inquiry being made, a person denies an incumbrance, he cannot afterwards set it up against the purchaser (*n*). But in this case mere silence has been held not sufficient to avoid the incumbrance, unless at least inquiry is made (*o*). The distinction between this and the case of an owner lying by is plain, since there is nothing inconsistent in the sale of property subject to an incumbrance, and the incumbrancer might have assumed that the transaction was of that character.

Even if a person in ignorance of his rights misleads a purchaser, the purchaser will be relieved against him if the circumstances were such that he ought to have known his rights; as where a father stands by and allows his son to dispose of a fee simple, supposing the fee was in the

Denying
incum-
brances.

Purchaser
misled in
ignorance.

(*m*) *Hobbs v. Norton*, 1 Vern. 554.

136.

(*n*) *Ibbotson v. Rhodes*, 2 Vern.

(*o*) *Osborn v. Lea*, 9 Mod. 96.

son, while in fact it was in the father himself, subject to the son's life estate (*p*).

Suffering
money to
be ex-
pended in
mistake.

The same principle applies to a case in which a person stands by and suffers another to lay out money on his property, supposing it to be his own. At law he could still have asserted his title without making compensation for the improvements; but in equity the person who had so expended money would be entitled to be indemnified either by a pecuniary compensation, or sometimes, as in the case of a lessee under a defective lease, by a confirmation of his title (*q*). The case is strengthened if there is some fiduciary relation such as that of agency between the parties (*r*).

But a person spending money by mistake upon the property of another has no equity against the owner, if he was ignorant of the expenditure; except in so far that if it is necessary for the owner himself to seek the assistance of equity with respect to the property, he will be required to do equity by making compensation as a condition of obtaining relief (*s*). And if after notice of an adverse title, a person proceeds to lay out his money, equity will not assist him merely because no active steps have been taken to establish the title (*t*).

Coverture
or infancy
no excuse.

The case of *Savage v. Foster* (*u*) shows that coverture is no excuse for such instances of fraud as those we are now considering: it is equally well established that infancy affords no better protection (*x*). An infant cannot, it is true, be made answerable in equity any more than at law for a contract which he has made during his minority, on the mere ground that without any assertion on his part the other party believed him to be of full age (*y*); but he is never suffered to take advantage of his own wrong (*z*).

(*p*) *Teasdale v. T.*, Sel. Ch. Ca. 59. *ing*, 6 Ha. 273; *Ramsden v. Dyson*, 1 L. R. H. L. 129, 141.

(*q*) *Beaufort v. Patrick*, 17 Beav. 60, 75.

(*u*) 9 Mod. 35.

(*r*) *Cawdor v. Lewis*, 1 Y. & C. Ex. 427.

(*x*) *Watts v. Cresswell*, 2 Eq. Ca. Ab. 515.

(*s*) *Neesom v. Clarkson*, 4 Ha. 97.

(*y*) *Stikeman v. Dawson*, 1 De G. & Sm. 90.

(*t*) *Master of Clare Hall v. Hard-*

(*z*) *Clarke v. Cogley*, 2 Cox, 173.

2. *Frauds on Powers.*

It is an established principle of equity that a donee of a Powers limited power must execute it *bond fide* for the end ^{must be exercised} designed. Otherwise the appointment, though good in *bond fide* law, will be held corrupt and void in equity.

The leading case on this subject is

ALEYN v. BELCHIER.

[1 Eden, 132; 1 W. & T. L. C. 415.]

A power of jointuring was executed in favour of a wife, but with an agreement that the wife should only receive a part as an annuity for her own benefit, and that the residue should be applied to the payment of the husband's debts. It was held that this agreement was a fraud upon the power, and the execution was set aside, except so far as related to the annuity.

The appointor must, in exercising such a power, act with good faith and sincerity, and with an entire and single view to the real purpose and object of the power. He cannot carry into execution any indirect object, or acquire any benefit for himself either directly or indirectly (*a*). And though the donee of a limited power may validly release it, he may not do so fraudulently any more than he can appoint fraudulently (*b*).

Such is the general principle; and it includes cases in which there is not, as well as those in which there is an antecedent agreement with the appointee to effect purposes not within the scope of the power; as well cases in which a benefit is sought to be attained for third parties foreign to the power, as those in which the appointor seeks to benefit himself. We may thus illustrate its application by four classes of cases.

(1.) Where there is an antecedent agreement.

(i.) For a benefit to the appointor himself.

A frequent instance of this is where a father has a

Ante-
cedent
fraudulent

(a) *Portland v. Topham*, 11 H. L.
32.

(b) *Cunningham v. Thurlow*, 1 R.
& M. 436, n.

agree-
ment.
For benefit
of the
appointor.

power of appointment among children, and he bargains with some of them for some benefit for himself, *e.g.*, the payment of his debts in consideration of the appointment in their favour. Such an appointment is deemed fraudulent and void (*c*). The same was held where the appointor bargained that the appointed fund should be lent to him (*d*), and also where the appointment was exercised in consideration of an agreement for the purchase of other expectant shares belonging to them (*e*).

(ii.) For the benefit of third parties foreign to the power.

For the
benefit of
strangers.

Instances of this are where the donee of a power of appointment among children stipulates for a benefit for his or her wife or husband, as in *Carver v. Richards* (*f*); or conversely where a power of jointuring is exercised under a bargain for the benefit of the children. And of course, a case in which there is not such close relationship between the parties stands on no better ground (*g*).

(2.) Where there is no antecedent agreement,

(i.) and the appointor seeks his own advantage.

Fraudu-
lent
design of
appointor
to benefit
himself.

Perhaps the most flagrant example of this form of fraudulent appointment is where a father, having a power of raising portions for children, directs a portion to be raised long before it is required, or in favour of a sickly child, with a view to acquiring the money as next of kin of the child on its decease (*h*).

Fraudu-
lent
release.

The case already cited of a fraudulent release may also be referred to in this connexion. There a father released his power as to a part of the fund so as to vest it in himself as representative of a deceased son. The Court, however, refused to give effect to the release (*i*).

(*c*) *Farmer v. Martin*, 2 Sim. 502.

(*d*) *Arnold v. Hardwick*, 7 Sim. 343.

(*e*) *Cunynghame v. Anstruther*, 2 L. R. Sc. & D. 223.

(*f*) 1 De G. F. & J. 548.

(*g*) *Birley v. B.*, 25 Beav. 299.

(*h*) *Hinchingbroke v. Seymour*, 1 Bro. C. C. 395; *Wellesley v. Mornington*, 2 K. & J. 143.

(*i*) *Cunningham v. Thurlow*, 1 R. & M. 436, n.

But an appointment is not necessarily invalid because the appointee is an infant (*k*), nor because the appointor may derive some benefit from the appointment. If the whole transaction when looked at together shows no appearance of *mala fides*, but only an intention to improve the whole subject-matter of the appointment, there is no reason why the appointor should not participate in the improvement (*l*). So also an ultimate limitation in favour of the appointor may be unobjectionable (*m*).

In such cases the burden of proving a corrupt purpose is generally on the person who attempts to impeach the transaction (*n*), though the circumstances may be so strong against the appointor, for instance, where one appointment has already been set aside for fraud, that this position will be reversed, and the appointor will be required to show the innocence of his act (*o*).

(ii.) Where the appointor intends benefit for strangers to the power.

The intention of the donor of the power in limiting the objects thereof must be strictly followed, and that intention extends as well to the persons entitled in default of appointment as to the objects themselves. To allow the appointor to depart from the terms of the power would be to substitute his purpose for that of the donor in the disposition of the donor's property (*p*). Thus an appointment amongst children is invalidated by a reservation of a benefit for another person, for instance a husband, though it may never have been communicated to him (*q*). And an attempt to impose upon the appointee a condition not authorised by the power falls within the same principle (*r*). Nor does it make any difference that the settlor himself

Benefit-
ing
strangers.

(*k*) *Beere v. Hoffmister*, 23 Beav. 101; *Fearon v. Desbrisay*, 14 Beav. 635.

(*l*) *Re Huish's Charity*, 10 Eq. 5; *Roach v. Trood*, 3 Ch. D. 430.

(*m*) *Cooper v. C.*, 5 Ch. 203.

(*n*) *Campbell v. Home*, 1 Y. & C. Ch. 664.

(*o*) *Topham v. Portland*, 5 Ch. 40, 62; *Humphrey v. Olver*, 28 L. J. Ch. 406.

(*p*) *Topham v. Portland*, 1 De G. J. & S. 517; 11 H. L. 32.

(*q*) *Re Marsden*, 4 Drew. 594.

(*r*) *D'Abbadie v. Bizoin*, 5 I. R. Eq. 205.

is the donee of the power; having declared the trusts he must follow them (*s*).

The mere fact that the appointee, soon after the appointment re-settles the property on other persons, not objects of the power, will not in the absence of some further evidence of a bargain to that effect, invalidate the appointment. Such re-settlement is quite consistent with perfect good faith in the appointor (*t*).

Fraud
prevails
against
volunteers
under the
donee.

It is further to be observed that a fraudulent execution of a power will be set aside, not only as against the appointor, but also as against persons claiming under him as volunteers, or even as purchasers for valuable consideration, unless they acquire the legal estate without notice of the fraud (*u*). If he takes the legal estate with notice, or the mere equitable estate even without notice, he cannot sustain his purchase against the persons entitled in default of appointment (*x*). But it seems that where he secures the legal estate, actual notice must be brought home to him; a mere suspicion will not suffice (*y*).

Fraudu-
lent
consent.

An appointment is equally invalid where the consent of certain persons is required, and such consent has been obtained by fraud (*z*), or on the other hand has been fraudulently given (*a*).

Partial
fraud
when
wholly
vitiating
an appoint-
ment.

(3.) The question often rises, whether a fraudulent arrangement as to part of the property appointed vitiates the appointment *in toto*, or only as to the part to which the fraud extends. In the leading case of *Aleyn v. Belchier* we find an authority for the severance of the appointment, a part being sustained, and only the part intended for a corrupt or illicit purpose being set aside (*b*). In this case, the power was one of jointuring, and there was thus only a single lawful object of the power. But

(*s*) *Lee v. Fernie*, 1 Beav. 483.

(*t*) *Routledge v. Dorril*, 2 Ves. jr. 467.

(*u*) *Palmer v. Wheeler*, 2 Ba. & Be. 18.

(*x*) *Daubeny v. Cockburn*, 1 Mer. 626.

(*y*) *M'Queen v. Farquhar*, 11 Ves. 467.

(*z*) *Scroggs v. S.*, Amb. 272, 812.

(*a*) *Eland v. Baker*, 29 Beav. 137.

(*b*) See also *Lane v. Page*, Amb. 233.

in the case of a power of appointment to several objects, an appointment fraudulent in part will usually be wholly set aside (*c*). The distinction seems to be sound and well established. For in the case of a power of jointuring where there is evidently an intention to exercise the power, there can be no mistake as to the benefit to be received by the donee; but where there are several objects among whom the appointor may select at his discretion, and he appoints improperly, there is no means of ascertaining in what way he would have divided the fund had his intention been innocent (*d*).

The exception to this rule illustrates the principle of this distinction; for we find that where there is evidence by which the Court can distinguish what is attributable to an authorised purpose from what is tainted with fraud, the appointment may be severed, part being sustained, and part set aside (*e*). This is the case where, though the two appointments are contemporaneously made, the proper can be clearly distinguished from the improper transaction (*f*).

(4.) The case of an appointor executing an appointment in pursuance of a bargain inconsistent with the terms of the power, and therefore corrupt and invalid, must be distinguished from a case in which the appointees contract with each other to allow some benefit to the appointor. This is frequently the case where a parent has a power to appoint among children, and the children agree to deal with the fund by way of a family arrangement under which the parent is benefited. Such an arrangement will, indeed, be carefully scrutinised (*g*), but if it is found to be *bonâ fide* it will not be disturbed (*h*).

Another distinction which it is important to indicate is that between the intention or purpose and the motive of

Contracts
between
appointees.

Motive of
appoint-

(*c*) *Daubeny v. Cockburn*, 1 Mer. 626.

(*d*) *Farmer v. Martin*, 2 Sim. 502; *Arnold v. Hardwicke*, 7 Sim. 343.

(*e*) *Topham v. Portland*, 1 De G.

J. & S. 517; 11 H. L. 32.

(*f*) *Rowley v. R.*, Kay, 242.

(*g*) *Agassiz v. Squire*, 18 Beav. 431.

(*h*) *Davis v. Uphill*, 1 Swanst. 129.

ment im-
material.

an appointor. A corrupt purpose, as we have seen, vitiates the appointment; but if the appointment be within the terms of the power, the Court will not advert to circumstances of anger or resentment which may have induced an unequal appointment (*i*).

Illusory
appoint-
ments.

(5.) Formerly, indeed, where a person had a non-exclusive power of appointment among a class, although with unfettered discretion as to the amount of the shares, and he appointed to some of the objects a merely nominal share, the appointment was set aside as being illusory and not *bonâ fide* following the intention of the power. This was done, for instance, where in appointing a fund of £100,000 amongst a class, the donee gave to one of the class five shillings only (*k*); and it was not necessary that the discrepancy should be so glaring as this. The difficulty, however, of determining the limits of what was illusory and what was not, was very great, and much litigation was occasioned. To avoid the inconveniences which were thus occasioned, the legislature interfered, and by 1 Will. IV. c. 46, it was enacted that after the passing of the Act, no appointment made in exercise of any power of appointment amongst several objects should be invalid or impeached in equity on the ground that an unsubstantial, illusory, or nominal share only should be thereby appointed or left to devolve as unappointed.

1 Will. IV.
c. 46.

Still there was nothing in the statute authorising an appointor under a non-exclusive power to omit entirely any one of the objects of the power. It was sufficiently absurd that an appointment should have been good if it gave £1000 to A., £1000 to B., and a shilling to C., but bad if the shilling was not given to C.; yet such was the law (*l*). The reasoning was that the gift of the shilling to C. was at least evidence that there had been no oversight in the execution (*m*). But now this distinction has disappeared,

(*i*) *Vane v. Dungeannon*, 2 S. & L. 118, 130; *Supple v. Lawson*, Amb. 729.

(*k*) *Morgan v. Surman*, 1 Taunt.

289.

(*l*) *Bulfeel v. Plummer*, 6 Ch. 164.

(*m*) *Re Stone*, 3 I. R. Eq. 621.

and since 37 & 38 Vict. c. 37, the difference between 37 & 38
exclusive and non-exclusive powers has ceased to exist, ^{Vict. c. 37.}
an appointment under a power of the latter kind being
no longer invalid on account of the omission of any of
the objects.

CHAPTER III.

MISTAKE AND ACCIDENT.

SECTION I.—MISTAKE.

*Description.*I. *Mistakes of Law.*1. *Generally.*2. *Special circumstances entitling to relief.*II. *Mistakes of Fact.*1. *Fundamental Mistakes.*2. *Unilateral Mistakes as to subject-matter.*3. *Mistakes of expression.**Rectification of instruments.**Defective execution of powers.*

Mistake
indefin-
able.

MISTAKES between parties to the various transactions of life of course assume an immense variety of forms, and present innumerable differences in degree. If it is dangerous to define fraud, lest the definition should be evaded by newly conceived devices, it is impossible to define mistake in such a manner as to indicate when it will and when it will not legally affect a transaction, because it is impossible to foresee or provide for the infinite variety of forms which it will assume in the accidents of business. Since no formal expression is needed to make clear the meaning of the word, and since no formula can be framed which shall generalise the legal effects of mistake, little advantage can be gained by attempting a definition. It is only by a

detailed analysis that we can learn when mistakes produce material legal effects, and when they do not ; and this being so, it can scarcely be other than illusory to pretend to convey any knowledge respecting it by the use of vague and general expressions.

In case, however, the student should wish such a definition as the nature of the case admits, we may quote that of Story, who, distinguishing mistake from accident, describes it as "some unintentional act, or omission or error, arising from ignorance, surprise, imposition, or misplaced confidence" (*a*). This definition serves, as intimated, to distinguish between mistake and accident ; but it fails to clearly mark the distinction which must be observed between mistake, pure and simple, and fraud.

Most of the cases in which questions arise as to the effects of mistake relate to transactions in which two or more parties are engaged or concerned, such as contracts, or dispositions of property. For purposes of classification we may, for the present, consider all such transactions as if they were between two parties only. It is evident, then, that there are three distinct species of mistake which may arise :—

- (1.) Mistake may be induced in one of the parties by an act or omission of the other party ;
- (2.) One of the parties may be mistaken apart from any consideration of the conduct of the other ;
- (3.) The mistake may be common to both parties.

The first of these species introduces considerations and principles quite distinct from those which relate to the remaining two. Mistakes thus induced by one of the parties amount to misrepresentations. It depends on a variety of circumstances whether or not they will be regarded as amounting to frauds. These circumstances we have made the subject of investigation under the heading of Fraud (*b*).

Classification of mistakes.

Misrepresentations distinguished from pure mistake.

(*a*) Story, 110.

(*b*) Pp. 139, *et seq.*

Two species of mistakes remain, the examination of which is not complicated by the admixture of the elements of fraud. The importance of distinctions between them will appear when we enter on the consideration of mistakes of fact.

Mistakes
of Law and
of Fact.

The most familiar classification of mistakes is that which distinguishes between Mistakes of Law and Mistakes of Fact. The contrast between these two classes is sometimes expressed by saying that relief is given against mistakes of fact, but not against mistakes of law. But this statement is very far indeed from accuracy. On the one hand, there are many circumstances in which relief will be granted against mistakes of law. On the other hand, a mistake of fact does not of itself, even *primâ facie*, entitle a person to be relieved from the consequences of his acts.

I. *Mistakes of Law.*

*Ignorantia
juris, &c.*

1. The familiar maxim "*Ignorantia juris neminem excusat*" expresses a principle which is necessary to the administration of justice. It has sometimes been stated that its operation is confined to the domain of criminal law (c); but it has long since been held as well in equity as at common law that parties may not, generally speaking, demand the rescission of their bargains or the reversal of their solemn acts on a ground so uncertain and difficult of determination as an alleged ignorance of law (d).

Limitation
of the
maxim.

The principle expressed by the maxim viewed thus broadly must certainly be assented to. But a close observation at once shows that a general expression in this form is far too vague to admit of being employed as a practical test. It presupposes an accurate knowledge of what is meant by law, and an unflinching power of discerning the precise boundary which distinguishes mistakes of law

(c) *Lansdown v. L.*, Mos. 364; 2 J. & W. 205.

(d) *Stewart v. S.*, 6 Cl. & F. 911, 966.

from mistakes of fact. Furthermore, it omits to take account of many peculiar circumstances which may render its application repugnant to common sense and to the elementary principles of equity. Before we can safely apply the maxim, we must, therefore, first inquire in what sense the term law is here used; and secondly, we must advert to certain special circumstances which are deemed to render a demand for relief both reasonable and equitable.

(1.) The maxim evidently applies only to English law. Not applicable to foreign law. No one is presumed to know the laws of foreign countries. They are invariably treated as matters of fact, to be elucidated, like other matters of fact, by evidence. And it is to be observed that the laws of Scotland and of the colonies, are in this, as in other respects, deemed foreign laws (e).

(2.) Although public statutes are as fully presumed to be known as the general principles of civil and criminal law, this is not the case with respect to private Acts of Parliament. In the absence of notice of these latter, ignorance or disregard of them amounts to a mistake of fact, and may be relieved against (f). Nor to private statutes.

(3.) It was said by Lord Westbury in *Cooper v. Phibbs* (g), that in the maxim under consideration the word 'jus' was used in the sense of denoting general law, the ordinary law of the country; but that when the word 'jus' was used in the sense of denoting a private right, the maxim had no application, private right of ownership being a matter of fact. But this qualification seems to be more apparent than real. Of course if ignorance of the private rights of another is due to ignorance of the matters of fact which have led to those rights, the mistake is then merely one of fact, and falls outside the present question altogether. But if the facts are known, the legal consequences of those facts are most clearly presumed to be known; for Its application to private rights considered.

(e) *Leslie v. Baillie*, 2 Y. & C. Ch. 91; *McCormick v. Garnett*, 5 De G. M. & G. 278.

(f) *Earl of Pomfret v. Lord Windsor*, 2 Ves. sr. 472, 480.

(g) 2 L. R. H. L. 149, 170.

those consequences are matters of general law, and must be included in the maxim if anything is. This is well illustrated in the case of *Pullen v. Ready* (*h*), where a devise was made to a woman upon condition that she should marry with her parents' consent: she married without such consent, whereupon a forfeiture accrued to other parties, who, though cognisant of the marriage without consent, executed an agreement which had the effect of waiving the forfeiture. They sought relief from this agreement, alleging that they were ignorant of the fact that forfeiture had been occasioned by the marriage without consent; but it was refused them on the ground that the forfeiture was a legal consequence of the facts before them, that their mistake was thus one of law, and was not entitled to relief (*i*).

Special
circum-
stances
grounding
title to
relief.

Funda-
mental
mistake.

2. Secondly, there are certain special circumstances under which, though the mistake alleged is undeniably one of law, it is deemed both reasonable and equitable to grant relief against it.

(1.) It is quite conceivable that the two parties to an agreement may both be labouring under a false impression as to a matter of law, the effect of which would be to make the agreement something entirely different from that which they intended. In such a case there is indeed no contract at all, the mutual agreement being different in substance from that which legally springs from their acts. It can scarcely be supposed that the law would in these circumstances enforce an agreement which was in truth never made by the parties at all. The question here is not whether a mistake of law will avoid a contract, but whether there ever was a contract (*k*).

Mistake in
formal
expression.

The case is quite analogous where, an agreement having been made, it is erroneously expressed through a mistake of law. Here again, to refuse relief against the erroneous

(*h*) 2 Atk. 587, 591.

sr. 126.

(*i*) See also *Irham v. Child*, 1 Bro. C. C. 92; *Bingham v. B.*, 1 Ves.

(*k*) See Pollock Contr. 394-5.

expression would be to hold the parties to an agreement which they never made (*l*).

(2.) We have already excluded from the present consideration cases in which erroneous impressions respecting the law have been actively produced in the mind of one of the parties by the other. Persons so deceived are entitled to relief, for in such a case there exist the most conspicuous elements of actual fraud, and equity is ever ready to relieve against fraud, whatever form it may assume (*m*). Misrepresentation
actual
fraud.

But circumstances less strong than active and wilful deception may suffice to evidence such a fraudulent disposition as to warrant the interference of equity for its discomfiture. For instance, if one of the parties to a transaction parts with his property in manifest ignorance of a plain and settled principle of law, the fact of allowing him so to act is often deemed to be sufficient evidence of an unfair advantage having been taken to call for equitable interposition. This has been illustrated by the case of an eldest son of an intestate agreeing, in ignorance of his rights of heirship, to divide the estates with a younger brother (*n*). But here, as before, the true ground of relief is not the fact of a mistake of law, but the fraud which is implied. Implied
fraud.

(3.) There are cases also in which a formal and solemn act performed in ignorance of a legal right has been reversed on the ground of mere surprise; for instance, where a woman who was entitled to elect, hastily decided in ignorance of her right to an account (*o*). Where the surprise has been common to both the parties to a transaction, there is of course still stronger ground for granting relief. Such cases approach more or less closely to those already mentioned, in which the error goes to the very foundation of the contract (*p*). Surprise.

(4.) The maxim has no application where the alleged Matters of

(*l*) *Ibid*.

(*m*) *Willan v. W.*, 16 Ves. 72.

(*n*) *Story*, 122; *Hunt v. Rous-*
maniere, 1 Peters. Sup. C. U. S. 1,
15, 16.

(*o*) *Pusey v. Desbouverie*, 3 P. Wms.
315, 321; and *Evans v. Llewellyn*,
2 Bro. C. C. 150; 1 Cox, 333.

(*p*) See *Cochrane v. Willis*, 1 Ch.
58.

doubtful
construc-
tion.

ignorance is not that of a well-known rule of law, but that of a matter of law arising upon a doubtful construction of an instrument. In this case relief may be given (*q*). But where in such circumstances a fair compromise is entered into without any circumstances of fraud or surprise it will not be afterwards disturbed (*r*).

Family
com-
promises
upheld.

(5.) Especially is this the case where such compromise is of the nature of a family arrangement (*s*). In *Westby v. W.* (*t*), Lord St. Leonards said: "Wherever doubts and disputes have arisen with regard to the rights of different members of the same family, and fair compromises have been entered into to preserve the harmony and affection, or to save the honour of the family, those arrangements have been sustained by this Court; albeit, perhaps, resting on grounds which would not have been considered satisfactory if the transaction had occurred between mere strangers" (*u*). Long course of dealing and acquiescence by the parties concerned may suffice to sustain an arrangement of the nature of a family compromise, where there has been no written contract (*x*).

Unless
tainted
with fraud.

But an agreement cannot be sustained, even as a family arrangement, if in the least degree tainted with fraud; there must be full disclosure of all material circumstances known to one of the parties (*y*), and especially so if the parties are not on equal terms, or there is any confidential relation between them (*z*). Nor will a family arrangement be sustained if one of the parties has entered into it under a simple misunderstanding of his interests, respecting which there could be no reasonable doubt (*a*). Of course such circumstances as threats, or undue influence of any kind, will in these, as in other cases, invalidate an agreement (*b*).

(*q*) *Beauchamp v. Winn*, 6 L. R. H. L. 223.

(*r*) *Pickering v. P.*, 2 Beav. 56; *Naylor v. Winch*, 1 S. & S. 564.

(*s*) *Stapilton v. S.*, 1 Atk. 2.

(*t*) 2 Dr. & W. 503.

(*u*) See *Cory v. C.*, 1 Ves. sr. 19.

(*x*) *Williams v. W.*, 2 Dr. & S.

378; 2 Ch. 294; *Clifton v. Cockburn*, 3 My. & K. 76.

(*y*) *Gordon v. G.*, 3 Swanst. 400.

(*z*) *Pusey v. Desbouverie*, 3 P. Wins. 315.

(*a*) *Dunnage v. White*, 1 Swanst. 137.

(*b*) *Ellis v. Barker*, 7 Ch. 104

Mistakes of expression in the instrument embodying such compromises will be relieved against just as similar mistakes occurring elsewhere (c). Mistakes of expression in compromises.

With these explanations and limitations, the principle that equity will not relieve against a mistake of law may be safely accepted ; and it will have been observed that those cases in which relief is given do not really amount to exceptions from the principle, since in all of them the relief is grounded not on the mere fact that there has been a mistake, but on some other fact which is, independently of that, efficacious to call forth the remedial power of equity.

II. *Mistakes of Fact.*

The inquiry as to the effects of mistakes in matters of fact is more complex and important. It must always be borne in mind that those cases, numerous though they are, in which transactions are deemed void or voidable on the ground of mistake, all constitute exceptions to the general rule, which is that as regards private law, "mistake *as such* has no legal effects at all" (d). Mistake as such of no effect. It will be found that in all cases in which legal effects follow, some other ingredient is present beside the mere fact that one or both of the parties have acted under an erroneous belief. In one large class of cases the effect of the mistake is to prevent any real contract from being formed at all ; in these the agreements, though seemingly and formally valid, are in effect void. In another, though a valid agreement has been formed, owing to mistake in its expression, an equity is raised for its rectification, which though it could not be formerly effected in the Courts of common law, was provided for in those of equity. A third and important class comprises cases in which application is made to a special and discretionary jurisdiction of equity, in the exercise of

(c) *Ashurst v. Mill*, 7 Ha. 502. (d) Pollock, *Contracts*, p. 384, 2nd ed.

which Courts of equity are particularly careful that their decrees shall not be productive of hardship. This class applies almost exclusively to suits for specific performance; and though the classification of the subject here would be clearly incomplete without reference to it, its full discussion falls more appropriately under the heading of specific performance (c).

1. *Fundamental mistakes.*

Where mistake prevents a contract from being formed.

By fundamental mistakes, we mean those the effect of which is to prevent any real contract from being formed between the parties. Contract requires consensual agreement; and if owing to some error on one or on both sides the parties have never had a common intention, it follows that no contract is formed.

Fundamental errors of this description being as efficacious at common law as in equity to prevent an apparent agreement producing the effects of a legal contract, do not require exhaustive exposition here. It suffices to illustrate them from cases which from their nature or their accompaniments have usually fallen under the special notice of equity.

Mistake as to the nature of the transaction.

(1.) First, there may be a fundamental mistake as to the nature of the transaction itself. Mistakes of this description may be peculiar to one, or common to both parties.

Execution of deeds by mistake.

An instance of the former is seen where a person executes a deed or signs an instrument under a mistaken belief as to its contents. Naturally cases of this description usually raise questions of fraud as well as of simple mistake; but it is clear that without fraud such a transaction may even at law be invalidated on the ground of mistake alone (d). A strong illustration of this is afforded by a case in which a person executed a mortgage deed under the mistaken belief that it was only a covenant to produce deeds. This mortgage, having been assigned to a pur-

(c) *q. v.* p. 603, *et seq.*

(d) *Foster v. Mackinnon*, 4 L. R.

C. P. 704, 711; *Kennedy v. Green*, 3 My. & K. 699, 717, 718.

chaser for value without notice, was nevertheless decreed to have been wholly void, and ordered to be delivered up to be cancelled (*e*). In this case had the deed only been voidable for fraud, no relief would have been given as against the *bonâ fide* purchaser for value. See also *Hunter v. Walters* (*f*).

A fortiori, if in such cases both parties are mistaken as to the nature of the deed or writing, the fact of a mere formal signature will not suffice to establish a contract.

(2.) Secondly, one of the parties may be mistaken as to the person of the other party. Such mistakes are almost necessarily unilateral. It is evident that they are not in all cases fundamental, since in many transactions the personality of the parties is quite immaterial; for instance, where a person sells goods for ready money, or a railway traveller takes a ticket. But in other cases it is of the very essence of the intention of one of the contracting parties to deal with another particular person, and if so, a mistake as to the person will invalidate the agreement (*g*); but it is at least questionable whether the same principle applies to deeds (*h*).

(3.) Thirdly, the error may relate to the subject-matter of the contract.

If a person intends by his contract to acquire one thing, he cannot be required to accept another. If, however, the mistake is as to a specific article, the agreement in English as in Roman law is not void unless there is a complete difference of substance (*i*).

One important class comprised under this heading consists of those cases in which the subject-matter in the contemplation of the parties does not in fact exist at the time of the agreement. Where in these circumstances the mistake is common to both parties, the agreement is void (*k*).

(*e*) *Vorley v. Cooke*, 1 Giff. 230.

(*f*) 7 Ch. 75, 88.

(*g*) *Boulton v. Jones*, 2 H. & N.

564.

(*h*) *Hunter v. Walters*, *sup.*

(*i*) *Kennedy v. Panama &c. Mail Co.*, 2 L. R. Q. B. 580.

(*k*) *Couturier v. Hastie*, 5 H. L. 673.

Mistake as to person.

Mistake as to subject-matter.

If subject-matter not in existence contract is void.

On this principle an agreement for the sale of shares in a company is void if, at the time of the agreement, a winding-up petition has been presented of which neither the vendor nor the purchaser knew (*l*). Similarly an agreement for the sale of a life interest after it has in fact, though without the knowledge of the parties, expired, is void (*m*).

Not if it is
confined to
one party.

If in such cases the mistake is confined to one of the parties, the agreement is *prima facie* valid; but it will usually be found that there is some ingredient of fraud involved which will render it voidable at the option of the mistaken party; these cases are quite distinguishable from those now under view.

Mistake as
to quality
or quantity
when
material.

Again, "a material error as to the kind, quantity, or quality of a subject-matter which is contracted for by a generic description may make the agreement void" (*n*).

Here again the agreement is only void in case the error is common to both parties (*o*). If only one is mistaken, it depends on circumstances presently considered whether or not it is voidable at his option (*p*). And the further limitation must be understood, that the difference is such as in the ordinary course of dealing and use of language amounts to a difference of kind.

Remedy as
to void
agree-
ments.

Where an agreement is void on the ground of fundamental error, it is open to either party to bring his action in the Chancery Division to have the transaction declared void, to have any deeds or written instruments executed or signed therein set aside or cancelled, and to be relieved from any possible claims in respect thereof.

2. *Unilateral mistakes as to subject-matter.*

Agree-
ments
when void-
able owing
to mistake.

Though a strict regard for our classification would require us here to deal only with cases in which seeming agreements are made void owing to mistake, this is a convenient place to consider certain cases in many respects

(*l*) *Emmerson's Case*, 1 Ch. 433.

(*n*) *Strickland v. Turner*, 7 Ex.
208; *Cochrane v. Willis*, 1 Ch. 58.

(*o*) *Pollock, Contr.* 418.

(*p*) *Smith v. Hughes*, 6 L. R. Q. B. 597.
(*p*) p. 187.

analogous to them, in which the mistake, though not actually involving fraud, produces a similar effect, and the agreement becomes only voidable at the option of the mistaken party, or perhaps, more strictly speaking, one of the parties is estopped from asserting that it is void.

This, as we have intimated, is often the case when a mistake which, if common to both parties would make the agreement void, is in fact confined to one of them. We have not to consider cases in which there is a distinct element of fraud, these being elsewhere investigated; our inquiry lies on the border line between them, and the cases which have been up to the present occupying our attention.

The circumstance that one of the parties has entered into an agreement under the influence of a mistake of fact has no legal effect unless—

(i.) The fact is material to the transaction, or in other words, is essential to its character.

What is or what is not a material or essential fact is a question which scarcely admits of solution in general terms. Perhaps the closest practicable definition is that a fact is said to be material when the formation of the contract is conditional upon its existence; but whatever the general expression employed, the ultimate decision must remain a matter of opinion. It must suffice here to state by way of illustration that defects of title, extensive difference as to the locality of an estate, or as to its extent, will give a claim to a rescission of a contract in equity (q).

(ii.) The mistake is not due to the negligence of the mistaken party.

Equity will never encourage negligence; and it accordingly will not grant any relief against a mistake of fact, however material, if it be such that the complainant might have avoided it by the exercise of reasonable diligence.

(q) Story, 141; *infra*, pp. 613, *et seq.*

as to a
fact which
there is an
obligation
to disclose.

(iii.) The fact is one which the party who has knowledge of it is under an obligation to disclose.

This excludes facts the means of information as to which are open to both parties ; and cases in which each party is presumed to exercise his own skill and judgment and there is no confidence reposed ; and also facts which are in their nature doubtful, and as to the probabilities of which each may be supposed to calculate in his own discretion (*r*).

It is evident that this qualification almost if not quite amounts to the statement that a unilateral mistake is only relieved against when a non-disclosure by the better informed party amounts to fraud (*s*).

No relief
against
persons
with an
equal
equity.

In cases arising out of transactions voidable on account of unilateral mistake, it must be remembered that equity will not interfere against a person who has an equal claim to its consideration. In these circumstances it will leave the law to prevail. Thus no relief will be granted against a *bonâ fide* purchaser for valuable consideration (*t*).

3. *Mistakes of expression.*

Mistakes of the kind last mentioned could from their nature only occur in mutual agreements. Those to which we now proceed may be found either in agreements or in voluntary dispositions of property. They occur whenever an agreement or disposition is sought to be embodied in a formal instrument, and the instrument is so framed as not to express clearly or truly the intention of the parties or party.

How far
law
remedies
mistakes
of expres-
sion.

(1.) At common law as well as in equity the simplest cases of this description have long been provided for by established rules of construction, which it suffices here to refer to in general terms. Thus at law clerical errors and omissions which could be certainly supplied from the context, and all mere grammatical mistakes were remedied (*u*) ;

(*r*) *Mortimer v. Capper*, 1 Bro. C. C. 158 ; 6 Ves. 24.

(*s*) See *Wright v. Goff*, 22 Beav. 207 ; *Met. Counties Soc. v. Brown*, 26 Beav. 454.

(*t*) *Powell v. Price*, 2 P. Wms. 535 ; *Davies v. D.*, 4 Beav. 54.

(*u*) *Doe d. Leach v. Micklem*, 6 East, 486.

the context of a doubtful expression might be referred to to ascertain its meaning (*x*), and the general intent was always regarded as prevailing over the particular expression (*y*).

(2.) Both at law and in equity indeed the rule has long been established that oral evidence is not generally admissible to vary a written instrument. But notwithstanding the existence of a written instrument, such evidence might even at law have been adduced to show that there was not in fact any agreement at all (*z*). In equity the general rule has been subjected to certain modifications which require particular notice.

Oral evidence.

For what purposes admissible at law.

Thus in equity oral evidence is admitted to show that either by accident, mistake or fraud, a written instrument does not truly express the intention and meaning of the parties (*a*) ; and if accident or mistake is clearly proved by such evidence, or is admitted by the other side, or is evident from the nature of the case, equity will rectify it (*b*).

In equity.

Again, equity has resorted to extrinsic evidence to modify the meaning of general words where there has been reason to suppose that they were not intended to bear their full and natural meaning. For instance, in construing a release, the general words are always limited to the matter or matters especially within the contemplation of the parties at the time when the release was given (*c*). One of the most important applications of this is seen in cases where a release is executed on the footing of accounts, which are subsequently found to be erroneous (*d*).

(3.) Perhaps the most striking illustrations of the jurisdiction of equity to rectify instruments which erroneously express the intention of the parties thereto, are found in cases respecting the rectification of marriage settlements,

Rectification of settlements.

- (*x*) *Browning v. Wright*, 2 B. & P. 13, 26. 305, 308.
 (*y*) *Ford v. Beech*, 11 Q. B. 866. (*b*) *Davis v. Symonds*, 1 Cox, 402, 404 ; *Fowler v. F.*, 4 De G. & J. 250.
 (*z*) *Pym v. Campbell*, 6 E. & B. 370 ; *Wake v. Harrop*, 6 H. & N. 775. (*c*) *L. & S. W. R. v. Blackmore*, 4 L. R. H. L. 610, 623.
 (*a*) *Murray v. Parker*, 19 Beav. 433. (*d*) *Miller v. Craig*, 6 Beav. 433.

which cases usually arise when there is a discrepancy between the preliminary articles and the settlement as finally executed.

Rules.

The principal rules which regulate these cases are clearly stated in the leading authority of

LEGG v. GOLDWIRE,

[Ca. temp. Talb. 20; 1 W. & T. L. C. 17],

and are to the following effect :—

(i.) If both the articles and the settlement were executed before the marriage, and there are discrepancies between them, then the settlement will generally be considered to express the true agreement, and equity will not interfere to make it conform to the articles.

(ii.) But if, even in this case, the settlement purports to be in pursuance of the articles, then, if there be a discrepancy, it will be presumed to have arisen from mistake, and equity will interfere to rectify it (*e*).

(iii.) And further, even though the settlement does not upon the face of it purport to be in pursuance of the articles, extrinsic evidence may be resorted to to show that such was the intention, and that the discrepancy arose from mistake (*f*).

(iv.) If the articles preceded the marriage, and the settlement was executed after the marriage, then equity will in all cases consider that the articles express the true agreement, and will rectify the settlement to make it conform therewith. The principle in this case is that after the marriage the parties are no longer in the same unfettered position, and that the agreement as expressed when they were free should be regarded as the true one (*g*).

Generally
mistake
must be
common,

Generally speaking, in cases coming under the third of these rules, the Court will only interfere on evidence of a mistake common to all parties (*h*), and the extent of the

(*e*) *West v. Errissey*, 1 Bro. P. C. 225.

(*f*) *Bold v. Hutchinson*, 5 De G. M. & G. 558; *Breadalbane v. Chandos*, 2 My. & Cr. 711, 739.

(*g*) *Legg v. Goldwire*, *supra*.

(*h*) *Sells v. S.*, 1 Dr. & Sm. 45; *Rooke v. Kensington*, 2 K. & J. 753, 764; *Fowler v. F.*, 4 De G. & J. 265.

rectification required must be clearly ascertained and defined by evidence cotemporaneous with or anterior to the deed (*i*). But there are cases in which on proof of a clear mistake of one party only, the Court has taken upon itself to rectify a settlement (*k*), and it is especially disposed to do so by any unfair or underhand dealing on the part of the husband (*l*). A settlement has indeed been rectified even against previous articles on the settlor's uncontradicted evidence of mistake (*m*).

Courts of equity will not reform a voluntary deed as against the grantor (*n*), nor will they decree a settlement as against purchasers for valuable consideration (including mortgagees) who have had no notice of the articles; but if they have had such notice, a settlement may be decreed against them (*o*).

(4.) The jurisdiction of equity to rectify mistakes in wills rests on widely different principles. In no case can oral evidence or any evidence *dehors* the will be admitted to vary or control the terms thereof. It is only when a mistake is apparent on the face of the will itself that the Court will interfere; oral evidence may be resorted to to explain a latent ambiguity.

Thus where a residue was directed to be divided between the testator's "two daughters equally," and in fact he had three daughters when the will was made, it was held that the three were entitled to share the property (*p*). A mistake in computing the amount of a legacy has similarly been set right (*q*).

A mere misdescription of a legatee will not defeat a legacy; but if a legacy is given to a person for a particular motive dependent on a supposed character which he has falsely assumed, he will not be suffered to demand his legacy.

(*i*) *Bradford v. Romney*, 30 Beav. 431. 628.

(*k*) *Harbidge v. Wogan*, 5 Ha. 258.

(*l*) *Clark v. Girdwood*, 7 Ch. D. 9.

(*m*) *Smith v. Hiffe*, 20 Eq. 666.

(*n*) *Phillipson v. Kerry*, 32 Beav.

(*o*) *Davies v. D.*, 4 Beav. 54.

(*p*) *Stebbing v. Walker*, 2 Bro. C. C. 857.

(*q*) *Milner v. M.*, 1 Ves. sr 106.

This was the case where a woman gave a legacy to a man supposing him to be her husband, whereas in fact the marriage was bigamous and void (*r*). *Vice versâ*, if a legacy is revoked upon a mistake of facts, for instance, on the supposition that the legatee is dead, equity will grant relief (*s*). But in cases of this description, whether the suit be to set aside or to establish a legacy on the ground of mistake, the Courts proceed with great circumspection. It does not follow that because one motive is expressed or is apparent, that the legacy is intended to depend upon it alone. The testator may be in some degree moved to confer a benefit by an erroneous supposition of relationship between himself and the beneficiary; but nevertheless the primary motive may be a personal love and affection which exist altogether apart from the fact of such relationship; and if this seems to be the case, equity will not, on mere proof that the supposed relationship did not exist, interfere to take away the benefit (*t*). Still less will proof that a testator has formed a false estimate of the character of a person form a ground for interfering with his testamentary dispositions. Equity never assumes to punish moral delinquencies by taking away civil rights (*u*).

(5.) *Defective execution of powers.*

One of the most useful heads of the jurisdiction of equity in relieving against accident and mistake, is its power to interfere in aid of the defective execution of powers. The principles on which it acts in these cases have been thus expressed by an eminent authority: "Whenever a man having power over an estate, whether ownership or not, in discharge of moral or natural obligations, shows an intention to execute such power, the Court will operate upon the conscience of the heir (or other person benefiting by the default) to make him perfect this in-

(*r*) *Kennell v. Abbott*, 4 Ves. 808 ;
Giles v. G., 1 Keen, 692.

(*s*) *Campbell v. French*, 3 Ves. 321.

(*t*) *Kennell v. Abbott*, *sup.*

(*u*) *Giles v. G.*, *sup.*

tention" (*x*). It was on the same principle that when a surrender of copyholds to the use of a will was legally requisite in order to an effectual testamentary disposition thereof, the want of such surrender was supplied in equity; but this interference has long been rendered unnecessary by statute (*y*).

The investigation of this subject resolves itself into the following inquiries:—

(i.) To what powers the principle applies; (ii.) What defects or mistakes will be relieved against; (iii.) In whose favour equity will so interfere.

(i.) Generally speaking it matters not what is the nature of the power respecting which the assistance of equity is sought. The cases in which it is material are exceptional. Thus powers of sale, of raising portions, of jointuring, of revoking uses, and of appointment generally, are continually the subjects of equitable relief.

Powers of leasing were at one time thought to form an exception to the general rule, but it has long been established that this is not so, and that a defective execution may in this as in other cases be aided (*z*). In certain cases of deviation from the terms of a power of leasing there is a special relief afforded to the intended lessee by statute (*a*), and such relief is available even if the power has been derived under an Act of Parliament.

But generally speaking powers arising under an Act of Parliament are construed strictly, and a defect in their execution will not be relieved against in equity (*b*).

(ii.) What defects will be relieved against.

The first and most essential condition of relief against a defect in the execution of a power is that there shall have been a clear intention on the part of the donee of the power to execute it (*c*).

(*x*) *Chapman v. Gibson*, 3 Bro. C. C. 229, per Lord Alvanley.

(*y*) 55 Geo. III. c. 192, 1 Vict. c. 26.

(*z*) *Shannon v. Bradstreet*, 1 S. & L. 52; *Dowell v. Dew*, 1 Y. & C. Ch.

345.

(*a*) 12 & 13 Vict. c. 26, 13 & 14 Vict. c. 17.

(*b*) *Roswell's Ca.*, per Hutton Ro. Abr. 379, fol. 6; *Anon.*, Freem. 224.

(*c*) *Garth v. Townsend*, 7 Eq. 220.

and conformable to the intention of the creator of the power.

Secondly, the granting of relief against a defective execution is always conditional upon the general rule that equity will not assist in defeating the intention of the person creating the power. It will not therefore dispense with any conditions imposed upon its execution which are not merely formal. Thus if the consent of any person is required, a power exercised without such consent will not be supported (*d*). And if a given time is prescribed within which the power must be exercised, this direction must be complied with (*e*). Still less will equity assist in setting up a defective execution which amounts to a breach of trust (*f*).

Defects of form relieved against.

The defects to which assistance of equity is afforded may be described generally as defects of form. The rule is that where an intention to execute the power is manifest, a mere non-compliance with prescribed forms will be remedied (*g*).

Substitution of a will for a deed.

Perhaps the most conspicuous illustration of the rule is the case in which a power, directed to be exercised by deed only, is in fact executed by will. This is regarded as a merely formal variation, and is relieved against (*h*). But the converse case is different; a power directed to be exercised by will only cannot effectually be exercised by deed; for a deed being an irrevocable instrument, to allow it to be used instead of a will would be to depart in substance from the intention of the donor of the power (*i*).

Equitable appointment.

Another large class of cases in which relief is afforded comprises those in which there has been an appointing instrument competent on the general principles of equity, but ineffectual at law; as where the donee of a power has covenanted or agreed to execute it (*k*), or has given a

(*d*) *Lawrenson v. Butler*, 1 S. & L. 13.

(*e*) *Cooper v. Martin*, 3 Ch. 47.

(*f*) *Mortlock v. Buller*, 10 Ves. 292, 317.

(*g*) *Shannon v. Bradstreet*, 1 S. & L. 63; *Fothergill v. F.*, Freem. 256.

(*h*) *Tollet v. T.*, 2 P. Wms. 489; *Sneed v. S.*, Amb. 64.

(*i*) *Reid v. Shergold*, 10 Ves. 370; *Adney v. Field*, Amb. 654.

(*k*) *Fothergill v. F.*, *sup.*; *Mortlock v. Buller*, *sup.*

written promise to grant an estate, which he can only fulfil by the exercise of a power (*l*). A recital in a deed has been considered a sufficient indication of intention to amount to an equitable execution (*m*).

Other defects more formal still are *a fortiori* aided ; As to number of witnesses. for instance, the presence of less than the prescribed number of witnesses, or an omission to seal an instrument which the donor of the power has directed to be signed and sealed (*n*). But the Wills' Act itself prevents any relief being given in case of non-compliance with its provisions (*o*).

By 22 & 23 Vict. c. 35, s. 12, it is now provided that a deed executed in the presence of and attested by two or more witnesses, shall so far as respects execution and attestation be a valid execution of any power of appointment by deed, notwithstanding that the instrument creating the power shall have required some additional or other forms of execution and attestation. This enactment covers many cases in which relief was formerly purely equitable.

Where trustees have a common power of sale over land, and they execute it defectively by selling without the timber or with a reservation of the minerals, the Court cannot, apart from authority conferred on it by statute, remedy the defect (*p*). But now, in the case of a reservation of timber, the Court is empowered, by 22 & 23 Vict. c. 35, s. 13, to aid the defect in its discretion, at the purchaser's expense ; and by 25 & 26 Vict. c. 108, unless in the instrument creating the power a reservation of minerals is expressly forbidden, no sale, exchange, or partition made in exercise of the power is to be deemed invalid merely on the ground that the power did not expressly authorise such reservation ; and hereafter such reservation may be made

Reservations under powers of sale.

(*l*) *Campbell v. Leach*, Amb. 740 ; *London Chartered Bank v. Lempriere*, 4 L. R. P. C. 572.

(*m*) *Wilson v. Piggott*, 2 Ves. jr. 351 ; *Cunynghame v. Austruther*, 2 L. R. Sc. & D. 223.

(*n*) *Wade v. Paget*, 1 Bro. C. C. 363 ; *Morse v. Martin*, 34 Beav. 500.

(*o*) 1 Vict. c. 26, s. 10.

(*p*) *Cockerell v. Cholmely*, 1 Cl. & F. 60, 1 R. & M. 418.

by trustees and others, including mortgagees, with the sanction of the Court, to be obtained on petition (q).

Non-execution not relieved against.

It is clearly settled that the principle which supplies a defect in the execution of a power does not extend to a non-execution. Thus if a person has been prevented from effecting an execution or an attempted execution by any accident such as sudden illness or death, there is no jurisdiction whatever to take the property from those entitled in default of appointment (r). The only possible exception to this would be a case in which execution was prevented by fraud, the general rule being that equity considers that as done which has been fraudulently prevented from being done. But there does not seem to be any express decision on the point (s).

(iii.) In whose favour equity will interfere.

Relief given to purchasers,

It has in many places been observed that equity will not interfere in favour of pure volunteers; and that principle applies here. It requires at least a meritorious consideration to support the claim of the person seeking relief.

creditors,
charities,
wife,
child.

The strongest claim is that of a purchaser, which term includes a mortgagee and a lessee (t). Creditors are also entitled to relief (u), and charities, which are generally favoured in equity (x). In the leading case of *Tollet v. Tollet* (y) similar assistance was afforded in favour of a wife; a legitimate child is in the same position (z); and in these cases it matters not that the claim is made upon a meritorious consideration only, as, for instance, upon a provision made after marriage (a); nor is the relief barred by the fact that the wife or child is otherwise provided for (b).

(q) *Re Beaumont*, 12 Eq. 86.

(r) *Tollet v. T.*, 2 P. Wms. 489; *Buckell v. Blenkhorn*, 5 Ha. 131, 141.

(s) See *Middleton v. M.*, 1 J. & W. 94.

(t) *Fothergill v. F.*, Freem. 256; *Taylor v. Wheeler*, 2 Vern. 564;

Campbell v. Leach, Amb. 740.

(u) *Wilkes v. Holmes*, 9 Mod. 485.

(x) *Innes v. Sayer*, 7 Ha. 377.

(y) *Sup.*

(z) *Sneed v. S.*, Amb. 64.

(a) *Hervey v. H.*, 1 Atk. 567.

(b) *Ibid.*; *Chapman v. Gibson*, 3 Bro. C. C. 229.

But in the absence of some natural or moral obligation on the part of the donee of the power to provide for the person in whose favour the defective execution has been made, no aid will be given (*c*). Thus a husband (*d*), a grandchild (*e*), and collateral relations (*f*) have no title to relief; and *à fortiori* a volunteer, even though he be the creator of the power himself (*g*).

No relief
to hus-
band,
grandchild,
collaterals.
Volun-
teers.

The interference of equity is also subject to the further condition that it will not be afforded if the person entitled in default of appointment has a claim on the donee equal to that of the person who seeks to have the execution aided (*h*). In other words, as between equal claimants, equity will not interfere. This limitation is chiefly illustrated by cases in which a child has been entitled in default of appointment, and the effect of the appointment would be to leave him totally unprovided for (*i*).

Or against
a person
having an
equal
equity.

(*c*) Farwell, 276.

(*d*) *Moodie v. Reid*, 1 Madd. 516.

(*e*) *Tudor v. Anson*, 2 Ves. sr. 582.

(*f*) *Goodwyn v. G.*, 1 Ves. sr. 228.

(*g*) *Watts v. Bullas*, 1 P. Wms. 60, note.

(*h*) Farwell, 277.

(*i*) *Chapman v. Gibson*, *sup.*; *Morse v. Martin*, 34 Beav. 500.

SECTION II.—ACCIDENT.

*Definition.*I. *Extent of remedy at Law.*II. *Characteristics of remedy in Equity.*

Accident
defined.

Accident, in the sense in which the word is used in Courts of equity, has been defined as comprising "such unforeseen events, misfortunes, losses, acts, or omissions, as are not the result of any negligence or misconduct in the party" (*h*).

Distin-
guished
from
mistake.

The distinction between accident and mistake is manifest and important. Mistake has reference to a state of things at the time at which the contract or other transaction in question takes place. Accident refers to some event which occurs subsequently to the transaction. Mistake is essentially subjective; it indicates a mental condition of one or both of the parties concerned. Accident is objective; it relates to facts wholly external to the parties. Mistake affects the quality or character of the transaction itself. Accident introduces some modification in the remedy which would otherwise be available, or gives rise to some particular claim for relief.

Jurisdic-
tion to
relieve
condi-
tional on
defect of
legal
remedy.

The jurisdiction of equity to grant relief in certain cases of accident is of very ancient date. In its inception it only extended to cases in which no adequate relief was attainable in a Court of law. From time to time Courts of law have acquired new powers of granting relief; but in this as in other branches of equity, the jurisdiction having once arisen was never afterwards affected by the increased powers of the law. The study of equity, therefore, still requires an examination of the jurisdiction as formerly contrasted with that of common law.

(*h*) Story, 78.

I. *Remedy at Law.*

In the inquiry, then, whether in any particular case of accident, equity had jurisdiction to grant relief, the first question was whether there was an adequate remedy at law. To answer this a brief *résumé* of the legal jurisdiction in cases of accident is required.

1. Courts of law have always recognised the plea of "*vis major*," or "the act of God." These terms are not indeed understood in a wide sense; but only as including "events which as between the parties, and for the purpose of the matter in hand, cannot be definitely foreseen or controlled" (*l*).

Thus where the performance of a contract depends on the existence of a specific thing, and by the accidental destruction of that thing performance becomes impossible, the contract is no longer enforceable at law (*m*). The law in such a case implies a condition that the contract shall be off if a thing necessary to its performance perishes without default of the contractor.

Similarly a contract for a future specific product is deemed at law to be conditional on such product eventually coming into existence. For instance, a contract to deliver 200 tons of a particular crop of potatoes was held to be *pro tanto* discharged by a failure of the crop to reach that amount (*n*).

Thus again, a contract for personal service is deemed to be conditioned upon the continuance of the life and health of the contracting party (*o*).

It scarcely need be said that these principles have no application where there is a warranty or express covenant against the loss or destruction of the thing in question. In such cases the destruction being evidently contemplated

(*l*) Pollock, Contr. 361-2.

Q. B. 462; 1 Q. B. D. 258.

(*m*) *Taylor v. Caldwell*, 3 B. & S. 826.

(*o*) *Farrow v. Wilson*, 4 L. R. C. P. 744; *Boast v. Firth*, *ibid.* 1.

(*n*) *Howell v. Coupland*, 9 L. R.

and expressly provided for, does not fall within the definition of an accident ; and we shall observe that in this respect there is no distinction between equity and law.

Loss and
destruction
of deeds.
Bonds.

2. In many cases the loss or destruction of deeds was remediable at law, evidence being admitted of the loss or destruction and of the contents (*p*). But in the case of bonds the legal remedy was long inadequate, owing to the technical rule that the defendant was entitled to demand that it should be read in open court: in other words, *profert* and *oyer* of the bond were necessary to its enforcement. Hence an equitable jurisdiction to grant relief in such cases arose, which, as usual, has not been displaced by the amendment of the law in the same direction (*q*).

Bills,
notes.

17 & 18
Vict. c.
125.

3. A bill or note which was not negotiable might, it seems, notwithstanding its loss or destruction, have been proved and sued upon at law (*r*) ; but an acceptor of a negotiable bill or note could not have been compelled to pay it to any one who could not deliver it up (*s*). By 17 & 18 Vict. c. 125, s. 87, it is, however, enacted that "in any action founded upon a bill of exchange or other negotiable instrument, it shall be lawful for the Court or a judge to order that the loss of such instrument shall not be set up, provided an indemnity is given to the satisfaction of the Court or judge, or a master, against the claims of any other person upon such negotiable instrument." But this extension of the legal remedy did not, of course, affect the equitable jurisdiction which had before arisen.

II. *Remedy in Equity.*

These few illustrations will perhaps suffice to indicate, as far as our present purpose requires, the extent and character of the legal jurisdiction to grant relief in cases

(*p*) *Whitfield v. Fausset*, 1 Ves. sr. 387, 392.

(*q*) C. L. Proc. Act, 1852, 15 & 16 Vict. c. 76, s. 55.

(*r*) *Charnley v. Grundy*, 14 C. B.

608, 614 ; *Wain v. Bailey*, 10 Ad. & E. 616.

(*s*) *Hansard v. Robinson*, 7 B. & C. 90 ; *Ramuz v. Crowe*, 1 Ex. 167.

of accident. From them we may ascertain whether or not the first condition of equitable relief, namely, the inadequacy of the legal remedy, is complied with.

There is a second condition, equally important; namely, that the party seeking relief must show a conscientious title thereto.

Second condition is conscientious title to relief.

If, therefore, the party seeking relief has been guilty of gross negligence, or of other misconduct in the transaction, he cannot successfully appeal to equity (*t*). Or if both parties stand upon an equal footing in equity, in accordance with the common maxim, equity will not interfere with their legal position. Thus no relief will be given against an heir-at-law where accident has prevented the making of a will, or the will has been imperfect (*u*). And, generally, against a *bonâ fide* purchaser for value without notice, a Court of equity will not interfere on the ground of accident (*x*).

Effect of negligence or misconduct. Equities equal.

On similar grounds equity will not relieve against accident in matters of positive contract, where the possibility of the accident may fairly be considered to have been within the contemplation of the contracting parties. Thus a lessee who covenants to pay rent, or to keep the demised premises in repair during a given term will remain bound by his covenants as well in equity as at law, notwithstanding an accidental destruction of the premises; for such express contracts indicate an intention to secure the lessor against the consequences of accident; or at least it may be said that the lessee has been guilty of negligence in not protecting himself, by requiring exceptions from the general liability which he has deliberately undertaken (*y*).

Matters of positive contract.

Bearing in mind these two leading principles on which the equitable jurisdiction in matters of accident rests, we

(*t*) *Exp. Greenway*, 6 Ves. 812.

Story, 108.

(*u*) *Whitton v. Russell*, 1 Atk. 448; 1 Mad. 46; Story, 106.

(*y*) *Bullock v. Dommitt*, 6 T. R. 650; *Pym v. Blackburn*, 3 Ves. 34,

(*x*) *Malden v. Merrill*, 2 Atk. 8;

38; Story, 101.

are now prepared to notice in greater detail some particular instances of its application.

1. We have already briefly observed the nature and limits of the jurisdiction of Courts of law in the case of lost deeds and other instruments. We shall now investigate that of equity as dealing with the same class of cases.

Relief in
equity on
lost bonds.

Equitable interposition is very common and very beneficial in the case of lost bonds. Not only was there claim to relief on the ground that originally the Courts of law refused to dispense with the *proferet* and *oyer* of the bond, but there was the further ground that Courts of equity alone had the power of imposing just conditions on the party seeking relief. The maxim, "He who seeks equity must do equity," is conspicuously applicable to such cases; and equity gives effect to it by requiring a plaintiff who seeks to enforce a bond while alleging its loss, to give a suitable bond of indemnity (z). The procedure of equity also had the advantage of enabling it to require the plaintiff to maintain the fact of the alleged loss by affidavit (a).

Indem-
nity.

Proof of
loss on
oath.

Former
distinction
between
suit for
discovery
and for
relief.

There was formerly a distinction between the position of a plaintiff merely seeking discovery and that of one who at the same time asked for relief. Where the plaintiff asked only for discovery equity would make a decree without any affidavit of loss or offer of indemnity (b), the ground of the distinction being that in suits for discovery the interference of equity was merely auxiliary, and did not interfere at all with the original jurisdiction of the Courts of law. Under the new procedure, however, the reason of the distinction has disappeared, and the distinction itself become of no importance (c).

Lost title
deeds.

2. Another illustration of the superiority of the relief afforded by equity is supplied by those cases in which a title deed of land has been destroyed or concealed, and the

(z) *Exp. Greenway*, 6 Ves. 812; (b) *Dormer v. Fortescue*, 3 Atk. 132; *Walmsley v. Child*, 1 Ves. sr. 464. *E. I. Company v. Boddam*, 9 Ves. 344.

(a) *Exp. Greenway*, *sup.*

(c) Jud. Act, 1873, Ord. XXXI.

suffering party does not know which alternative is correct. In such a case equity can decree possession of the land to the plaintiff until the defendant shall either produce the deed or admit its destruction (*d*). Courts of law having had no power to put a defendant upon such terms, could afford no adequate relief in such a case. On similar principles a plaintiff in possession might have had his possession established under a lost deed in a suit for discovery (*e*).

3. In the case of lost negotiable instruments, as in that of lost bonds, a Court of equity was the proper forum in which to seek relief, because of its power to provide for an adequate indemnity to protect the defendant (*f*).

Lost negotiable instruments.

4. We have observed that contracts of personal service were at law deemed to be conditioned on the life and health of the contracting parties. In equity this principle is carried further. Thus where an apprentice has paid a premium in consideration of receiving instruction for a certain time, and before the expiration thereof the master becomes bankrupt, equity will apportion the premium and decree repayment of that for which, owing to the bankruptcy, the consideration has failed (*g*).

Contracts of personal service.

5. Other cases of accident fall still more peculiarly within the cognisance of Courts of equity. Thus if an executor or administrator pays the debts and legacies of his testator or intestate in full, in confidence that the assets are sufficient, but it is eventually found that from some accident or unforeseen occurrence they are deficient, equity alone can relieve; and it will do so where the deficiency has resulted from an innocent accident or mistake (*h*).

Payments by executors, &c.

and accidental loss of testator's property.

Instances of this kind are supplied by cases in which the goods of the testator have been stolen without any

(*d*) *Whitfield v. Fausset*, 1 Ves. st. 392.

(*e*) *Dormer v. Fortescue*, *sup.*

(*f*) *Hansard v. Robinson*, 7 B. & C. 90; *Glynn v. B. of England*, 2 ib. 38.

(*g*) *Hale v. Webb*, 2 Bro. C. C. 78.

(*h*) *Edwards v. Freeman*, 2 P. Wms. 447; *Hawkins v. Day*, Amb. 160.

negligence on the part of his executor (*i*), or have been destroyed, or damaged by fire, or otherwise (*k*); and also by cases in which an executor has reckoned as an asset a debt which he supposed to be still due, but which proves in fact to have been paid to the testator (*l*).

Annuities
accident-
ally re-
duced.

6. If, again, an annuity given by a will is secured by public stock which is afterwards reduced by Parliament (*m*), or becomes unproductive owing to a revolution (*n*), equity will grant relief as against the residuary legatees on the ground of accident.

(*i*) *Jones v. Lewis*, 2 Ves. sr. 240.

(*k*) *Clough v. Bond*, 3 My. & Cr. 490, 496.

(*l*) *Pooley v. Ray*, 1 P. Wms. 355.

(*m*) *Davies v. Wattier*, 1 S. & S. 463.

(*n*) *Hatchett v. Pattle*, 6 Madd. 4.

CHAPTER IV.

RELIEF AGAINST PENALTIES AND FORFEITURES.

*Principle of granting relief.*Peachy *v.* Somerset.Sloman *v.* Walter.I. *Relief when given.*II. *Limits of the principle.*

RELIEF against penalties and forfeitures was originally obtainable exclusively in equity, and this having been so, its jurisdiction remains, notwithstanding that its principles have from time to time been embodied in statutes, and thus become operative in Courts of Common Law ; and whatever distinctions between the two jurisdictions continued up to the passing of the Judicature Act, 1873, have by that statute been rendered unimportant.

There are two leading authorities on the doctrine of relief against penalties and forfeitures. In

PEACHY *v.* THE DUKE OF SOMERSET,

[1 Strange, 447 ; 2 W. & T. L. C. 1100,]

a person having incurred a forfeiture of a copyhold by making leases contrary to the custom of the manor, and by felling timber, digging stones, and grubbing up hedges, although he offered by his bill to make a recompense, was held not entitled to relief in equity. It was expressed that the true ground of relief against penalties was from

the original intent of the case ; if the penalty was designed only to secure money, then on recompense being given the Court would grant relief. But in

SLOMAN v. WALTER

[1 Bro. C. C. 418 ; 2 W. & T. L. C. 1112]

a somewhat wider view was taken ; and the rule was laid down that “ where a penalty is inserted merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed, and the penalty only as occasional, and therefore only to secure the damage really incurred.” So that whenever this is the case, even though the object of the penalty may be something more than to secure a payment of money, equity is wont to decree compensation in lieu thereof, to the extent of the damage really sustained.

Relief not
now con-
fined to
penalties
to secure
money
payments.

The test question therefore becomes, whether compensation can effectually be made. Penalties to secure payments of money are doubtless the simplest cases, since in them payment with interest is a complete compensation. But there are other cases in which damages for a non-compliance with a condition to perform some collateral act may be assessed with sufficient accuracy to render compensation equitable, and thus to avoid the extreme consequences of forfeiture.

We shall first illustrate the operation of the principle by referring to those classes of cases in which it is most frequently applied ; and secondly, shall indicate the limits of the principle by referring to certain cases in which it has not been considered applicable.

I. *Relief when given.*

Bonds.

1. Among the most frequent cases in which in the early times of English equity this jurisdiction was exercised, were the cases of common bonds, in which the payment of a given sum and interest was secured by a conditional

penalty of double the amount, or some other excessive sum. Relief in such cases was continually given in equity on the terms of paying the principal, interest, and costs, until the statutes 8 & 9 Will. III., c. 11, and 4 & 5 Anne, c. 16, rendered applications to equity for this purpose no longer necessary.

The same principle naturally applies where a penalty is inserted in any deed to secure a payment of money, for instance, purchase money (*a*). And relief in cases of this description is now provided for by the Common Law Procedure Act, 1860 (*b*), which permits payment into Court to be pleaded by leave of the Court or a judge in any action on any bond which has a condition to make void the same upon payment of a lesser sum at a day or place certain (*c*).

2. Relief is, as we shall elsewhere observe, also given when the penalty takes the form of requiring a higher rate of interest in case the principal or interest shall not be paid at the stated time or times (*d*); but if the agreement is that on condition of punctual payment a lower rate of interest shall be payable, then on breach of this condition the higher rate may be insisted on, and there is no equity to interfere with the claim (*e*).

In short it may be regarded as a principle of universal application that where the payment of a smaller sum is secured by a larger, the larger sum will be regarded as a penalty, the enforcement of which will be relieved against (*f*).

3. Where in a lease there was a clause of forfeiture for nonpayment of rent at a stated time, equity always held that the right of entry was only intended as a security for the rent, and continually relieved against it on the lessee's paying the arrears of rent accrued due with interest

(a) *Exp. Hulse*, 8 Ch. 1022.

(b) 23 & 24 Vict., c. 126.

(c) Sect. 25.

(d) *Stanhope v. Manners*, 2 Ed. 199, *infra* p. 218.

(e) *Nicholls v. Maynard*, 3 Atk. 519.

(f) *Astley v. Weldon*, 2 B. & P. 350-355.

8 & 9 Will. III.

c. 11;

4 & 5

Anne,

c. 16.

Covenants

to pay.

C. L. P.

Act, 1860.

Interest
in mort-
gages.

Forfeiture
for non-
payment
of rent.

thereon. This principle has now long been recognised by statute, but its application has been thereby limited to cases in which relief is sought within six months after execution (*g*).

Mort-
gages.

4. Similarly relief is continually given against the forfeiture of a mortgaged estate by default of payment at the time named in the deed; the mortgagor having nevertheless an equity to redeem on payment of the principal, interest and costs.

Penalties
to secure
collateral
acts.

5. The case of *Sloman v. Walter* (*h*) affords another illustration of relief against a pecuniary penalty to secure a collateral act. There the condition of the penalty was that the defendant should have the use of a particular room in a house whenever he thought proper; on his seeking to recover the penalty, he was restrained by injunction on the bill of the plaintiff, pending the decision of an issue to ascertain the actual amount of damage sustained. In a similar case, a bond with a penalty of £600 not to carry on business save as therein specified within a given area, was relieved against, and actual damages only awarded (*i*).

Covenants
to insure.

6. Apart from legislation, Courts of equity had no power to relieve against forfeiture for breach of a covenant to insure, on the ground that the risk occasioned was of such a nature as to be incapable of estimation in damages (*k*). But owing to the hardship often occasioned by the strict interpretation of such covenants, it was enacted (*l*) that “a Court of equity shall have power to relieve against a forfeiture for breach of a covenant or condition to insure against loss or damage by fire, where no loss or damage by fire has happened, and the breach has in the opinion of the Court been committed through accident or mistake, or otherwise without fraud or gross negligence, and there is an insurance on foot at the time of the application to the

22 & 23
Vict. c. 35,
s. 4.

(*g*) 4 Geo. II. c. 28; 15 & 16
Vict., c. 76, ss. 210, 211; 30 & 31
Vict. c. 59.

(*h*) *Supra*, p. 206.

(*i*) *Hardy v. Martin*, 1 Bro. C. C.
419, n.

(*k*) *Green v. Bridges*, 4 Sim. 96.

(*l*) 22 & 23 Vict. c. 35.

Court, in conformity with the covenant to insure, upon such terms as to the Court may seem fit" (*m*). By s. 6 it is provided that the Court shall only have power to relieve the same person once in respect of the same condition (*n*). Similar power was conferred on Courts of common law by 23 & 24 Vict. c. 126, ss. 2, 3. These cases ^{23 & 24 Vict. c. 126.} are now included in the more comprehensive measure recently passed; see p. 213.

7. Where there are in a deed several covenants or provisions for the performance of several acts or a succession of acts, and a certain sum is by the same instrument stipulated to be paid upon the breach of any or of all such stipulations, the sum will be considered as a penalty, and only the actual damage sustained can be recovered. This is well illustrated by *Kemble v. Farren* (*o*), where the contract was that the defendant should act at Covent Garden Theatre for four seasons, receiving £3 6s. 8d. for every night the theatre was open. There was a proviso that if either party should neglect or refuse to fulfil the said agreement or any part thereof, such party should pay to the other the sum of £1000, and it was agreed that this sum should be considered as liquidated damages, and not as in the nature of a penalty. Nevertheless, on a breach of the agreement in the second season, the Court held that this sum was a penalty, since there was no attempt at proportioning it to the extent of the breach. ^{One sum securing several acts regarded as penalty;}

It will be seen that this case further establishes the rule that even an express agreement between the parties that a certain sum shall be considered as liquidated damages, and not as a penalty, will not override the principle of equity in cases where it clearly applies. ^{notwithstanding an express agreement.}

8. Another illustration of a similar kind is afforded by those recent cases in which the Courts have refused to enforce a bye-law of a railway company to the effect that a passenger who travels without a ticket beyond the

(*m*) s. 4.

(*n*) See *Page v. Bennet*, 2 Giff.

117.

(*o*) 6 Bing. 141.

distance for which his ticket is issued must pay the whole fare from the place from which the train started (*p*). The principle resembles that of *Kemble v. Farren* (*q*), it being considered that the same sum cannot be reasonably demanded as damages for breaches of contract differing in degree.

Accident,
surprise, or
fraud.

9. In cases in which relief might not otherwise have been given, if there have been any unavoidable accident, surprise, excusable ignorance, or fraud, which has prevented the execution of a covenant, the Court will interfere upon compensation being made (*r*). Under such circumstances as these, relief has been given against a forfeiture of a breach of a covenant to repair (*s*); and similarly where the act of forfeiture has been committed in reliance on the assurances of an agent of the defendant (*t*), and where the right to claim forfeiture has been waived (*u*).

II. *Limits of the Principle.*

Compensation
must be
ascertainable.

1. It being a condition of granting relief against a penalty or forfeiture that proper compensation for the breach of the agreement shall be made, it follows that where there is no means of ascertaining what amount of compensation would be equitable, no relief will be given.

Covenant
to repair;

Thus in the case of a breach of a general covenant to repair, by which a forfeiture has been incurred, equity has hitherto usually refused to interfere (*x*). The case of a covenant not in general terms, but to lay out a specific sum in a given time, has been sometimes distinguished (*y*), but

(*p*) *Brown v. G. E. R. Co.*, 2 Q. B. D. 406.

(*q*) *Sup.*

(*r*) *Eaton v. Lyon*, 3 Ves. 690, 693; *Hill v. Barclay*, 18 Ves. 56, 62.

(*s*) *Hughes v. Met. R. Co.*, 1 C. P. D. 120; 2 App. C. 439.

(*t*) *Wing v. Harvey*, 5 De G. M. & G. 265.

(*u*) *Croft v. Lumley*, 5 E. & B. 648.

(*x*) *Gregory v. Wilson*, 9 Ha. 683, 689.

(*y*) *Hack v. Leonard*, 9 Mod. 90.

it seems that even in such cases relief would only have been given under special circumstances (*z*). On similar grounds relief has been refused in case of a breach of a covenant to build houses (*a*), and of a covenant to cultivate land in a husband-like manner (*b*). All these cases are, however, now provided for by statute (see p. 213), and relief in accordance with its terms may be given notwithstanding the breach of any covenant, excepting those therein expressly excepted.

2. It is a common stipulation in public undertakings that shareholders shall forfeit their shares on non-payment of calls. It might at first sight seem that this presented a reasonable case for relief on payment of the arrears with interest; but equity has, on grounds of public policy, refused to interfere in these cases (*c*). What distinguishes them from the case of a lessee who allows his rent to fall into arrear, is that in the former case the undertaking is usually of a more or less speculative character, and it would be inequitable to allow a shareholder to lie by and withhold his calls indefinitely until the chances of success were fully ascertained. The danger of a multiplicity of actions arising in case relief was so afforded has also been of weight in the decisions. Where, however, in the articles of association of a public company there is no stipulation or clause conferring upon directors a power to declare shares forfeited, they have no implied power to do so (*d*); nor have the managers of a cost book mine (*e*). And wherever such a power of forfeiture is provided, it will be strictly construed, and every condition prescribed for its exercise must be complied with (*f*).

3. The Court has no jurisdiction to grant relief against any penalties imposed by statute (*g*). Within this principle

to build,
&c.

Forfeiture
of shares
for non-
payment
of calls.

(*z*) *Hill v. Barclay, sup.*; *Bracebridge v. Buckley*, 2 Price, 200, 215.

(*a*) *Croft v. Goldsmid*, 24 Beav. 312.

(*b*) *Hills v. Rouland*, 4 De G. M. & G. 430.

(*c*) *Sparks v. Liverpool Waterworks*, 13 Ves. 428.

(*d*) *Re National &c. Co.*, 7 W. R. 369.

(*e*) *Clarke v. Hart*, 6 H. L. 633.

(*f*) *Ibid.*; *Goulton v. London &c. Co.*, W. N. 1877, p. 141.

(*g*) *Keating v. Sparrow*, 1 Ba. & Be. 367; *Re Brain*, 18 Eq. 389.

fall penalties imposed by benefit building societies in accordance with their rules under 6 & 7 Will. IV. c. 92 (*i*).

Persons may not elect between an agreement and a penalty.

4. Though in many cases, as above shown, equity relieves against a penalty or forfeiture which has been incurred by a breach of contract, it will not suffer a person who has entered into an agreement, to escape the obligation of specifically performing it by electing to pay the penalty stipulated in case of non-performance. The case of *French v. Macale* (*k*) is usually referred to on this question. There it was laid down by Lord St. Leonards that "if a thing be agreed upon to be done, though there is a penalty annexed to its performance, yet the very thing must be done;" and the rule applies whether the contract be to do or to abstain from doing anything (*l*).

Contracts varying on certain conditions.

But care must be taken to distinguish between such cases and those in which a certain sum is agreed to be paid as the price of or consideration for doing or abstaining from doing a given act—for instance, where a lessee covenants to reside on the premises or not to plough land, and if otherwise to pay an additional rent. Here the additional rent will not, on the one hand, be regarded as a penalty, so as to be relieved against, nor on the other hand can the lessee be restrained from exercising the option given to him (*m*). Where the contract is of this nature, the Court will not infer from the fact of the additional sum reserved being disproportioned to the actual damage resulting that it is in the nature of a penalty (*n*); but if together with a covenant for additional payment there is also a clause of forfeiture, the payment will then, it seems, be deemed a penalty (*o*).

Liquidated damages.

5. The cases last discussed illustrate the distinction between a penalty and liquidated damages, on which distinction the whole of the present question turns. It has

(*i*) *Parker v. Butcher*, 3 Eq. 762; 327.

Provident P. B. Soc. v. Greenhill, 9 Ch. D. 122.

(*k*) 2 Dr. & W. 269.

(*l*) *Ibid.*; *Fox v. Scard*, 33 Beav.

(*m*) *Rolfe v. Peterson*, 2 Bro. P. C. 436; *Hardy v. Martin*, 1 Cox, 27.

(*n*) *Chilliner v. C.*, 2 Ves. sr. 528.

(*o*) *French v. Macale*, *sup.*

already been seen that the mere use of the term liquidated damages, or even an express agreement that a sum shall be considered as such, is not conclusive as to its character. The Court will look at the whole transaction in order to determine whether the payment provided for is rightly to be regarded as a penalty or not (*q*); and the leaning of the Court is in favour of the construction which regards the sum named as a penalty (*r*).

6. By the recent Conveyancing Act (*s*) the powers of the Court to relieve against the forfeiture of leases has been largely increased. It is thereby enacted that a right of re-entry or forfeiture under any proviso or stipulation in a lease, or a breach of any covenant or condition therein, shall not be enforceable by action or otherwise until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and in any case requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter to remedy the breach (if capable of remedy), and to make reasonable compensation in money, to the satisfaction of the lessor. Where the lessor is proceeding by action or otherwise to enforce such right of re-entry or forfeiture, the lessee may apply to the Court for relief, which the Court may grant or refuse on such terms as it may think fit. The statute expressly excepts from its operation covenants or conditions against assigning, underletting, or parting with the possession, or disposing of the land leased, and also covenants or conditions in mining leases to allow the lessor to inspect the mine or its books, &c., and it does not affect the law relating to re-entry or forfeiture or relief for non-payment of rent. It relates to existing as well as to future leases, and repeals 22 & 23 Vict. c. 35, ss. 4—9, and 23 & 24 Vict. c. 126, s. 2.

(*q*) *Dimech v. Corlett*, 12 Moo. P. C. 199; *Jones v. Green*, 3 Y. & J. 298, 304.

(*r*) *Davies v. Penton*, 6 B. & C. 216.

(*s*) 44 & 45 Vict. c. 41, s. 14.

CHAPTER V.

MORTGAGES AND LIENS.

SECTION I.—MORTGAGES AT LAW AND IN EQUITY.

- I. *Mortgages at Common Law.*
- II. *The Equity of Redemption.*
 - Howard *v.* Harris.
 - Casborne *v.* Scarfe.
 - Thornborough *v.* Baker.
- III. *Assignment of Mortgages.*
- IV. *Persons entitled to Redeem.*
- V. *Time of Redemption.*
- VI. *Mortgages of a Wife's Property.*
- VII. *Mortgages of Personalty.—Bills of Sale.*

I. *Mortgages at Common Law.*

1. The common law recognised two kinds of landed security, *vicum vadium* and *mortuum vadium*. The *vicum vadium* consisted of a feoffment to the creditor and his heirs until out of the rents and profits he had satisfied himself his debt. The creditor took possession, received the rents, and applied them in liquidation of the debt. When it was satisfied the debtor might re-enter and maintain ejectment. It seems to have been called *vicum vadium* because neither debt nor estate was lost.

*Vicum
vadium.*

*Mortuum
vadium.*

2. The *mortuum vadium* was a feoffment to the creditor and his heirs to be held until the debtor paid his debt,

until which time the creditor received the rents without account. The estate was unprofitable or dead to the mortgagor in the meantime, the original debt remaining undiminished. As in the *vivum vadium*, so in this security, the estate was never lost to the debtor.

3. Both these securities have long been obsolete, but there still exists a form of security which somewhat resembles each of them, namely, the Welsh mortgage. This consists of a conveyance of an estate to the creditor and his heirs to be held until the debt is discharged, the creditor meanwhile receiving the rents and profits as an equivalent for interest, while the principal remains undiminished. No covenant for the payment of the debt is inserted in the mortgage-deed, and the mortgagee has no power to compel redemption or foreclosure, though the mortgagor may redeem at any time (*a*). The Statute of Limitations (*b*) would probably bar the right of redemption at the expiration of twelve years from the *satisfaction of the debt*, but would not commence to run until then, the possession being up to that point not adverse (*c*).

4. In the place of the ancient contracts of *vivum vadium* and *mortuum vadium* arose the modern mortgage, which is thus described by Littleton (*d*): "If a feoffment be made upon such condition that if the feoffor pay to the feoffee at a certain day, &c., forty pounds of money, then the feoffor may re-enter; in this case the feoffee is called tenant in mortgage. . . . If the feoffor doth not pay, then the land, which is put in pledge upon condition for the payment of the money, is taken from him for ever . . . and if he doth pay the money, then the pledge is dead as to the tenant, &c."

The mortgage was thus an estate upon condition; a feoffment was made to the creditor with a condition in the deed of feoffment, or in a deed of defeazance executed at

(*a*) *Howell v. Price*, Prec. Ch. 423.

(*b*) 37 & 38 Vict. c. 57.

(*c*) Coote, p. 327, ed. 4.

(*d*) s. 332.

the same time, by which it was provided that on payment by the mortgagor or feoffor of a given sum at a time and place certain, it should be lawful for him to re-enter. Immediately on the livery made, the mortgagee or feoffee became the legal owner of the land, and in him the legal estate vested, subject to the condition. If the condition was performed the feoffor re-entered, and was in possession of his old estate. If the condition was broken, the feoffee's estate became absolute and indefeasible.

Conditions
required
to be
strictly
performed.

The common law generally required strict performance of conditions; and with respect to conditions in mortgages, the rules on which it acted were, if not so rigid as were observed in some cases, nevertheless sufficiently so to work great hardship on mortgagors. There were unbending requirements as to the time and manner of payment, any neglect of which resulted in the irremediable loss of the estate, however much it might exceed in value the sum advanced.

II. *The Equity of Redemption.*

General
principle;

1. It is evident that the above stated principles of common law are repugnant to the general doctrines of Courts of equity, according to which unreasonable penalties ought always to be relieved against. In the jurisprudence of the prætors at Rome, it had been established that where property was pledged for a debt, the debtor might redeem the estate on payment of the debt at any time before the passing of a judicial sentence confirming the creditor in his estate. The Court of Chancery could not, indeed, alter the legal effect of the forfeiture at law; it could not deprive the conveyance of its legal effect; but it brought the Roman principle into operation by another means. Acting *in personam* on the conscience of the mortgagee, equity declared it unreasonable that he should retain for

how esta-
blished.

his own benefit what was intended merely as a pledge, and it adjudged that the mortgagor had an "equity to redeem" the estate on payment within a reasonable time of the principal debt with proper interest and costs, notwithstanding the forfeiture at law (e). Thus was established, without direct interference with legal doctrines, the right known as the equity of redemption. So beneficial was this equitable interference found to be, and so tenaciously did the Courts of law still adhere to their rigid system, that mortgages soon fell almost entirely within the jurisdiction of the Court of Chancery, and have so continued to the present time. Now, by s. 34, sub-s. 3, of the Judicature Act, 1873 (f), the redemption and foreclosure of mortgages are expressly assigned to the Chancery Division of the High Court of Justice.

2. No sooner, however, was the equity of redemption established, than another bold decision was required to confirm the principle in its utility. It was found that creditors, eager to regain the unjust advantage which the law had afforded them, attempted to evade the fairer doctrine of equity by requiring their debtors expressly to preclude themselves by agreement from their right to redeem. Fortified by this express stipulation, they sought to rely on the maxim *modus et conventio vincunt legem*, and to assert this in opposition to the interference of equity. But the firmness of the Courts of equity prevented this result. Always looking at the intent rather than at the form of things, these Courts laid it down that the debtor could not by any engagement entered into at the time of the loan preclude himself from his right to redeem, and generally that it was inequitable that a creditor should obtain, through the necessities of his debtor, and under colour of a mortgage, a collateral advantage beyond the payment of principal, interest, and costs.

Mortgages fell within jurisdiction of equity.

Attempts to evade the equity by covenant.

(e) *Langford v. Burnard*, Tothill, 134; decided in 1594. (f) 36 & 37 Vict. c. 66.

On this point the case of

HOWARD v. HARRIS

[1 Vern. 190; 2 W. & T. L. C. 1058]

"Once a mortgage always a mortgage."

Invalid stipulations.

is a leading authority. It established the rule, curtly expressed in the phrase "once a mortgage always a mortgage," that the same deed could not at one time be a mortgage, and at another an absolute conveyance. Other authorities have added to this other principles of a similar nature. Thus it has been established that a stipulation in a mortgage that if the interest is not paid at the end of a year it shall be converted into principal, is invalid (*g*); so also is a stipulation that the mortgagor shall not pay the mortgage debt, or institute proceedings for redemption for twenty years (*h*), or that the mortgagee shall be receiver of the rents of the estate with a commission (*i*), or that the mortgagee in possession shall receive a certain sum for management (*j*). And though it is admissible, while reserving a given rate of interest, to agree that on punctual payment the interest shall be reduced (*k*), if it is stipulated that the rate of interest shall be raised unless punctually paid, this the Court will consider to be of the nature of a penalty, and will relieve against, even in a case of gross default (*l*). If there is a proviso for reduction of interest on punctual payment, a mortgagee in possession through the mortgagor's default is entitled to the higher rate (*m*).

In accordance with the same principle, equity will not allow a mortgagee to contract with the mortgagor *at the time of the loan*, for the absolute purchase of the lands at a specified sum in case of default in payment at a stated time (*n*). He may, however, agree for a preference of pre-

(*g*) *Chambers v. Goldwin*, 9 Ves. 271.

(*h*) *Cowdry v. Day*, 1 Giff. 316.

(*i*) *Langstaffe v. Fenwick*, 10 Ves. 405.

(*j*) *Comyns v. C.*, 5 I. R. Eq. 583; *Eyre v. Hughes*, 2 Ch. D. 198.

(*k*) *Nicholls v. Maynard*, 3 Atk. 519.

(*l*) *Ibid.*; *Stanhope v. Manners*, 2 Ed. 199.

(*m*) *Union Bank &c. v. Ingram*, 16 Ch. D. 53.

(*n*) *Price v. Perrie*, Freem. 258.

emption in case of sale, and this will be enforced if claimed within a reasonable time (o).

3. The important distinction must also be observed between a mortgage and an absolute sale of an estate with a proviso for the vendor to repurchase upon certain terms. If the Court considers that the transaction was not intended as a mortgage, but as such a conditional sale, it will bind the vendor strictly to his contract (p). So also where there is an absolute conveyance with a *subsequent* agreement that if the vendor desires it he may have his estate again upon repayment of the purchase money with interest or costs (q).

Distinction between mortgage and sale on condition

There being this important distinction between the effect of a mortgage and that of a conditional sale, it is necessary to consider what circumstances will furnish a criterion by which to distinguish between the two transactions; since it is evident that they will often *primâ facie* much resemble one another. There is no positive rule of law for this purpose; it depends upon the particular circumstances of each case. Parol evidence will always be admitted to show that an apparent conveyance was intended as a security only (r). If the money alleged to be purchase money is grossly inadequate as a price for the estate, or if interest is paid on the money, or the grantee accounts for the rents, or the grantor remains in possession, these are circumstances tending to show that the transaction was really a mortgage, and not a sale (s). The general principle is that *primâ facie* an absolute conveyance, containing nothing to show the relation of debtor and creditor, does not cease to be a conveyance, and become a mortgage, merely because the vendor stipulates that he shall have a right to repurchase. The question is, what

depends on the circumstances of each particular case.

Parol evidence.

(o) *Orby v. Trigg*, 2 Eq. Ca. Abr. 599; *Dawson v. D.*, 8 Sim. 346.

(p) *Alderson v. White*, 2 De G. & J. 97.

(q) *Cotterell v. Purchase*, Ca. t. Talb. 61.

(r) *England v. Codrington*, 1 Ed. 169; *Maxwell v. Montacute*, Prec. Ch. 526.

(s) *Brooke v. Garrod*, 3 K. & J. 608; 2 De G. & J. 62; *Williams v. Owen*, 5 My. & Cr. 303.

upon a fair construction is the meaning of the instrument (*t*).

Release or sale of equity of redemption.

There may also be a valid sale or release of the equity of redemption by the mortgagor to the mortgagee, and even if the consideration is inadequate, it will be enforced in the absence of fraud or duress (*u*).

Mortgage by way of family settlement.

Where the conveyance of an estate to a person by way of mortgage is intended to be in the nature of a family settlement, the equity of redemption may, contrary to the general rule, be confined to the life of the settlor or mortgagor, and his heirs will not be allowed to redeem (*x*).

Equity of redemption an estate.

4. The case of

CASBORNE v. SCARFE

[1 Atk. 603; 2 W. & T. L. C. 1051]

shows that an equity of redemption is not a mere *right*, as was considered in some early cases. It is, on the contrary, an estate in the land, and may be dealt with as such; for instance, it may be devised, granted, or entailed with remainders, and such entail and remainders might be barred by fine and recovery. Or it may be settled or mortgaged; only so, however, that all incumbrancers subsequent to the first, if he has the legal estate, will take subject to his prior right.

Further, the owner of an equity of redemption being considered as owner of the land, on his death intestate the descent of the equity of redemption will be governed by the same rules of law as the legal estate, whether the general rules of law or those of a special custom, such as gavelkind or borough English (*y*).

Legal personal representative of mortgagee entitled to mortgage debt.

5. The leading case of

THORNBOROUGH v. BAKER

[1 Ch. Ca. 283; 3 Swanst. 628; 2 W. & T. L. C. 1046]

illustrated another incident of the equity of redemption: namely, that while in the case of a mortgage in fee, on the

(*t*) Coote, 22; Shaw v. Jeffry, 13 Mo. P. C. 432.

(*u*) Ford v. Olden, 3 Eq. 461.

(*x*) Newcomb v. Bonham, 1 Vern.

7; Bonham v. Newcomb, *ib.* 214; King v. Bromley, 1 Eq. Ca. Abr. 595.

(*y*) Fawcett v. Lowther, 2 Ves. sr.

301, 304.

decease of the mortgagee, his *heir* must reconvey, on payment of the mortgage money, interest and costs, yet his *legal personal representative* will be entitled to the money. Now, however, power is conferred on the personal representatives to convey, the estate being deemed to vest in them as if it were a chattel real (*y*). In the case of an absolute conveyance with a collateral agreement for repurchase, if the purchaser dies, and the person who conveyed to him exercises his option of repurchase, the heir, and not the executor, of the purchaser will be entitled to the money (*z*).

III. *Assignment of Mortgages.*

A mortgagee has power alone at any time to assign the mortgage; but the assignee should for his own protection always obtain the concurrence of the mortgagor. This is necessary because the assignee can only take subject to all equities, and to the state of the account as between the mortgagor and mortgagee. If the mortgagor does not concur, he is not bound by the amount of the debt appearing upon the face of the mortgage. If, in fact, the mortgage debt has been paid off, the security is determined; if partly paid, it is determined *pro tanto* (*a*). Further, if a mortgage is assigned, and the assignee fails to give notice of the transfer to the mortgagor, his security is liable to be prejudiced by any payments made by the mortgagor to the mortgagee subsequent to the assignment (*b*). *A fortiori* a mortgagor cannot be prejudiced by any agreement between a mortgagee and his assignee to increase the amount of the principal due, as by converting interest into principal (*c*); but if the assignment is with the concurrence of the mortgagor, and there is an arrear of interest thereon, any interest paid by the assignee to the mortgagee will be taken as principal, and will carry interest (*d*).

Mortgagee may assign alone;

but assignee should require concurrence of mortgagor,

or at least give notice.

(*y*) 44 & 45 Vict. c. 41, s. 30.
(*z*) *St. John v. Wareham*, cited, 3 Swanst. 631.

(*a*) *Matthews v. Wallwyn*, 4 Ves. 118; *Williams v. Sorrell*, *ibid.* 389.

(*b*) *Chambers v. Goldwin*, 9 Ves. 254.
(*c*) *E. of Macclesfield v. Fitton*, 1 Vern. 169.

(*d*) *Ashenhurst v. James*, 3 Atk. 271.

Mortgagee in possession account-able after assign-ment.

Moreover, if a mortgagee is in possession, he is considered in equity for many purposes as a trustee; and then if he assigns the mortgage without the consent of the mortgagor he will still remain liable to account for the profits, on the principle that it would be a breach of trust to assign to an unreliable person (e).

Assignee may usually recover the whole mortgage debt.

It has been questioned whether, in cases in which an assignee purchases a mortgage for less than is due upon it, he is entitled to claim from the mortgagor the whole of the original sum, or only the amount which he has paid. As a general rule, it appears that he is entitled to the benefit of his purchase, and may claim the whole debt (f). But if the purchaser stands in any fiduciary relation towards the owner of the estate, as trustee, executor, guardian, or agent, he will be considered as having purchased for the benefit of the estate, and will only be allowed repayment of what he actually gave (g).

Secus if there is a fiduciary relation.

IV. *Persons entitled to Redeem.*

Persons entitled to redeem :

Having discussed some of the principal characteristics of an equity of redemption, the next inquiry is as to what persons are or may be entitled to redeem.

Heir.

(1.) We have seen that the equity of redemption may descend to an heir. In other words, an heir may redeem; and it is sufficient for him to show a *prima facie* title (h).

Devisee.

(2.) An equity of redemption may be devised—i.e., a devisee may bring an action to redeem (i).

Assignee.

(3.) An equity of redemption may be assigned; thus, an assignee may redeem (j).

Trustee in bankruptcy.

(4.) An equity of redemption, being an estate in the mortgagor, devolves upon his bankruptcy upon the trustee; thus a trustee in bankruptcy is entitled to redeem (k).

(e) 1 Eq. Ca. Abr. 328.

241 n.; *Lloyd v. Wait*, 1 Ph. 61.

(f) *Phillips v. Vaughan*, 1 Vern. 336; *Anon*, 1 Salk. 155.

(i) *Lewis v. Nangle*, 2 Ves. sr. 431.

(g) *Morret v. Paske*, 2 Atk. 52, 54.

(j) *Anon*, 3 Atk. 314.

(h) *Pym v. Bowreman*, 3 Swanst.

(k) *Franklyn v. Fern*, Barnard. Ch. 30.

(5.) Judgment creditors, who have a lien on an equity of redemption, are entitled to redeem (*l*) ; but it is necessary that they should have issued execution under 23 & 24 Vict. c. 38, or 27 & 28 Vict. c. 112 (*m*), as otherwise their lien on the land is not complete. Judgment creditors when their lien is complete.

(6.) A plaintiff in a creditor's suit for administration may, after a decree for sale of the real estate, bring an action against the mortgagee to redeem, in order to carry out the sale (*n*). Plaintiff in administration suit.

(7.) When an equity of redemption became forfeited to the Crown, the Crown or its grantee might redeem (*o*). Under 33 & 34 Vict. c. 23, the administrator or interim curator of the estate of the felon may presumably do so. Crown on forfeiture.

(8.) So a lord claiming the reversion by escheat may redeem a mortgage term (*p*). Lord on escheat.

(9.) Although a voluntary conveyance be void under 27 Eliz. c. 4, as against purchasers, and so against the mortgagee, who is *pro tanto* a purchaser, nevertheless a volunteer under such a conveyance of an equity of redemption may redeem (*q*). Volunteers.

(10.) In short, any person interested in the equity of redemption may redeem—*e.g.*, a dowress (*r*) ; a tenant for life, remainderman or reversioner (*s*), the tenant for life having the first option ; a tenant by the curtesy (*t*) ; and a jointress (*u*). Any person interested in equity of redemption.

(11.) Lastly, a subsequent mortgagee may redeem, making the mortgagor or his heir a party to his action (*x*). A subsequent mortgagee.

Where any person entitled to redeem tenders the mortgage money and interest, he is entitled to a delivery of the title deeds, and to have a conveyance of the property (*y*).

A mortgagor entitled to redeem has power to require the

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| (<i>l</i>) <i>Stonehewer v. Thompson</i> , 2 Atk. 440. | 59. | (<i>r</i>) <i>Palmer v. Danby</i> , Prec. Ch. 137. |
| (<i>m</i>) <i>E. of Cork v. Russell</i> , 13 Eq. 210, 215. | | (<i>s</i>) <i>Aynsly v. Reed</i> , 1 Dick. 249. |
| (<i>n</i>) <i>Christian v. Field</i> , 2 Ha. 177. | | (<i>t</i>) <i>Jones v. Meredith</i> , Bunb. 357. |
| (<i>o</i>) <i>Att.-Gen. v. Crofts</i> , 4 Bro. P. C. 136. | | (<i>u</i>) <i>Howard v. Harris</i> , <i>sup.</i> |
| (<i>p</i>) <i>Downe v. Morris</i> , 3 Ha. 394. | 276 ; | (<i>x</i>) <i>Fell v. Brown</i> , 2 Bro. C. C. 227 ; |
| (<i>q</i>) <i>Rand v. Cartwright</i> , 1 Ch. Ca. | | (<i>y</i>) <i>Pearce v. Morris</i> , 5 Ch. 227. |

mortgagee, instead of reconveying, to assign the mortgage debt, and convey the property to any third person (*y*).

V. *Time of Redemption.*

No power
to redeem
before the
time
named.
If not
then, six
months'
notice.

1. A person cannot redeem before the time appointed in the mortgage deed, although he tenders to the mortgagee both the principal and the interest due up to that time (*z*). If he does not pay the debt at the appointed time, he must give six months' notice of his intention to do so, since it would evidently be unfair to the mortgagee to compel him to accept his money without giving him an opportunity of providing for its reinvestment.

If due notice is given, and then the mortgagee refuses to accept a full tender of the principal, interest, and costs, thus compelling the mortgagor to seek a remedy in an action for redemption, the mortgagee will be compelled to pay the costs of the action (*a*).

Limitation
apart from
the statute.

Disability.

Acknow-
ledgment.

2. Independently of the Statute of Limitations (*b*), a mortgagee could not generally be disturbed after twenty years' possession without any acknowledgment of the mortgagor's title (*c*). The imprisonment, infancy, coverture, or absence beyond seas of the mortgagor were regarded as exceptional circumstances entitling him to exceptional consideration, and, after the analogy of the older statute (*d*), ten years were allowed after the removal of the disability (*e*). Moreover, even in the absence of fraud or oppression, a very slight act of acknowledgment of title on the part of the mortgagee, such as keeping private accounts of the profits, sufficed to preserve the equity of redemption (*f*). *A fortiori* the keeping of accounts with the mortgagor or his heir, or an acknowledgment of the equity of redemption in a conveyance or

(*y*) 44 & 45 Vict. c. 41, s. 15.

(*z*) *Brown v. Cole*, 14 Sim. 427.

(*a*) *Grugeon v. Gerrard*, 4 Y. & C. Ex. 119, 128; *Harmer v. Priestley*, 16 Beav. 569.

(*b*) 3 & 4 Will. IV. c. 27.

(*c*) *Anon*, 3 Atk. 313.

(*d*) 21 Jac. I. c. 16.

(*e*) *Jenner v. Tracy*, 3 P. Wms. 287, n.

(*f*) *Fairfax v. Montague*, cited, 2 Ves. jr. 84; *Hansard v. Hardy*, 18 Ves. 455.

devise would suffice for that purpose (*g*); and even parol evidence of the conversation of the mortgagee has been admitted on behalf of a mortgagor seeking redemption (*h*). Parol evidence.

3. But the many difficulties which thus arose were in a great measure put an end to by 3 & 4 Will. IV. c. 27, which fixed the limitation of the mortgagor's equity at twenty years after the time at which the mortgagee obtained possession or receipt, unless in the meantime an acknowledgment of the title of the mortgagor or of his right of redemption should have been given to the mortgagor or some person claiming his estate or to an agent of such mortgagor or person, in writing signed by the mortgagee or the person claiming through him. The same statute further provides that if there be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment if given to any of such mortgagors or persons, shall be as effectual as if given to all; but that if there shall be more than one mortgagee, &c., the signature of one shall be only effectual against himself and the persons claiming through or under him (*i*). Statute 3 & 4 Will. IV. c. 27, s. 28.

This section has now been replaced by the provisions of a more recent statute (*k*) which came into operation on the 1st January, 1879, and which enacts that when a mortgagee shall have obtained possession or receipt of the profits of land, or of any rent comprised in his mortgage, the mortgagor or any person claiming through him shall not bring any action or suit to redeem the mortgage, but within *twelve* years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment in writing of the title of the mortgagor or of his right to redemption shall have been given to the mortgagor or to some person claiming his 37 & 38 Vict. c. 57.

(*g*) *Smart v. Hunt*, 4 Ves. 478 n.;
Conway v. Shrimpton, 5 Bro. P. C.
 187.

See *Whiting v. White*, 2 Cox, 290.
 (*i*) s. 28.

(*k*) 37 & 38 Vict. c. 57.

(*h*) *Perry v. Marston*, 2 Cox, 295.

estate, or to the agent of such mortgagor or person, signed by the mortgagee or the person claiming through him; and in such case no action shall be brought but within twelve years after such acknowledgment. The provisions for the cases of an acknowledgment by one of two or more mortgagors or to one of two or more mortgagees correspond to those of the earlier act.

Time only runs when possession is adverse.

Time will not run under these acts against the mortgagor while the possession of the mortgagee is not adverse, but may be referred to another title; thus for instance, if a mortgagee purchased the estate of a tenant for life who had joined the remainderman in mortgaging the estate, and entered into possession, time would not run against the remainderman during the life of the tenant for life (*l*).

What is sufficient acknowledgment.

4. There are numerous cases respecting the question as to what is a sufficient acknowledgment within the statutes. It will be observed that by the language of both Acts the acknowledgment must be given to the mortgagor himself, or to those claiming his estate; an admission to a third person does not suffice, except indeed to an agent or solicitor of the mortgagor or claimant (*m*). No particular form of acknowledgment is required, nor need the amount due be stated (*n*); an acknowledgment will not, however, be inferred from equivocal expressions (*o*).

It has been decided that the sections suspending the running of the statute pending disability do not apply as between mortgagor and mortgagee (*p*).

VI. Mortgage of Wife's Property by Husband and Wife.

Wife's estate considered

It is a well-established rule that whenever a husband and wife join in mortgaging the wife's estate of inheritance

(*l*) *Hyde v. Dalliway*, 2 Ha. 528.

(*m*) *Trulock v. Roby*, 12 Sim. 402;
2 Ph. 395; *Stansfield v. Hobson*, 3
De M. & G. 620.

(*n*) *Ibid.*; *St. John v. Boughton*, 9

Sim. 219.

(*o*) *Thompson v. Bowyer*, 9 Jur.
N. S. 863.

(*p*) *Kinsman v. Rouse*, 17 Ch. D.
104; *Forster v. Patterson*, *ib.* 132.

for the benefit of the husband, her estate will be considered only as surety for his debt; and on the husband's death the wife or her heir will be entitled to have her estate exonerated out of his property, and may if necessary prove with other creditors for the debt (*q*).

Upon the same principle where a wife paid her husband's mortgage debt by a loan out of her separate estate, she was held entitled to stand in the place of the mortgagee (*r*), and where she joined with him in charging her estate she was similarly entitled (*s*). *A fortiori*, if she alone mortgages her separate estate to raise money for her husband, she is in the same position as any other of his creditors (*t*).

But in order to claim exoneration from the husband's estate, the debt must be distinctly his debt. A mortgage of the wife's estate in order to pay debts contracted by her before marriage (*u*), or a mortgage effected before her marriage, which the husband afterwards covenants to pay, will not be charged against the husband's property to exonerate that of the wife (*x*). And the same rule applies if the wife receives into her own hands or has the absolute disposal of the mortgage money (*y*). The burden of proof is not, however, on the wife, to show that the money was applied for her husband's benefit, but it is for his representatives to show that it was not so (*z*); and they may avail themselves of parol declarations of the wife for this purpose (*a*).

Where the wife's estate is mortgaged, notwithstanding that the equity of redemption is reserved to the heirs of the husband, there will be a resulting trust for the wife and her heirs (*b*). The mere form of reservation is not

(*q*) *Hudson v. Carmichael*, Kay, 613, 620; *Pitt v. P.*, T. & R. 180.

(*r*) *Parteriche v. Powlet*, 2 Atk. 384.

(*s*) *Ibid.*; *Robinson v. Gee*, 1 Ves. sr. 252.

(*t*) *Hudson v. Carmichael*, *sup.*

(*u*) *Lewis v. Nangle*, 1 Cox, 240; Amb. 150.

(*x*) *Bagot v. Oughton*, 1 P. Wms. 347.

(*y*) *Clinton v. Hooper*, 1 Ves. jr. 173; 3 Bro. C. C. 201, 212; *Thomas v. T.*, 2 K. & J. 79.

(*z*) *Kinnoul v. Money*, 3 Swanst. 202, 208 n.

(*a*) *Clinton v. Hooper*, *sup.*

(*b*) *Broad v. B.*, 2 Ch. Ca. 161.

sufficient to alter the previous title, but is considered as an inaccuracy or mistake to be corrected by the state of the title as it was before the mortgage (c).

Nevertheless, if it appears to have been the intention of the wife to alter the limitation of the equity of redemption, effect will of course be given to it. The presumption is the other way, but may be rebutted by satisfactory evidence (d).

VII. *Mortgages of Personalty.—Bills of Sale.*

For the protection of creditors against secret dispositions of property to their prejudice, and at the same time for the protection of debtors against the machinations of money-lenders, mortgages of personal chattels have been made the subject of special legislation.

Before, however, directing attention to the provisions of the Acts by which such transactions are regulated, it is necessary to refer to certain rules which, apart from the statutes, distinguish mortgages of personalty from mortgages of real estate.

Mortgage
contrasted
with
pledge.

First, the distinction must be observed between a mortgage and a pledge, a distinction analogous to that of Roman Law between the contracts of *hypotheca* and *pignus*.

We have seen that a mortgage is a conveyance or transfer of property upon condition, becoming absolute if the condition is not performed, but subject to be avoided by performance of the condition. And this definition is as applicable to mortgages of personalty as to those of realty.

Pledges.

A pledge or pawn, on the other hand, is a security created by the actual or constructive delivery of the *possession* of a personal chattel to a bailee, or pledgee, the

(c) *Ruscombe v. Hare*, 6 Dow. 1 ;
2 Bli. N. S. 192.

(d) *Jackson v. James*, 1 Bli. 104 ;
Reeve v. Hicks, 2 S. & S. 403.

general property in the chattel remaining in the pledgor; the pledgee having only a special property or right of retainer until the payment of the debt secured (*e*). The law as to pledges does not require detailed exposition here, falling rather under the head of bailments at Common Law than under any doctrine of equity.

A pledgee may indeed sue in equity for foreclosure and sale of his pledge (*f*), and if a time for redemption has been fixed by the contract, he may, on giving due notice to the pledgor, sell without applying for the authority of a judicial decree (*g*). A Court of Common Law is, however, the proper forum for a pledgor seeking to redeem, unless the need of some special equitable relief, such as account or discovery, or an assignment of the pledge necessitates an appeal for equitable assistance (*h*).

Mortgages of leaseholds generally follow the analogy of those of freeholds, giving rise to the same remedies of foreclosure or sale on the one hand, and redemption on the other. There is, however, an important distinction between such mortgages and mortgages of personal chattels. The latter are indeed subject to redemption in the usual way (*i*); but the mortgagee, after breach of condition, has a right to sell, upon giving due notice, without suing for foreclosure (*k*).

But the chief distinctions relating to such mortgages are those which arise from the provisions of the Bills of Sale Acts, 1854 and 1878 (*l*). The former Act applies to all bills of sale executed before the 1st of January, 1879; the latter to all since that date. Their provisions are in the main the same, the later Act differing from the earlier chiefly in the stringency of the regulations required, and

(*e*) *Jones v. Smith*, 2 Ves. jr. 372, 378.

(*f*) *Exp. Mountfort*, 14 Ves. 606.

(*g*) *Martin v. Reid*, 11 C. B. N. S. 730; *Kemp v. Westbrook*, 1 Ves. sr. 278.

(*h*) *Jones v. Smith*, *sup.*

(*i*) *Kemp v. Westbrook*, *sup.*

(*k*) *Tucker v. Wilson*, 1 P. Wms. 261.

(*l*) 17 & 18 Vict. c. 36; 41 & 42 Vict. c. 31.

Remedies
of pledgee.

Lease-
holds.

Personal
chattels.

Bills of
Sale Acts.

in its greater comprehensiveness and clearness of definition.

17 & 18
Vict. c. 36.

The causes and purposes of the Acts are well indicated in the preamble of that of 1854, which recites that, "Frauds are frequently committed upon creditors by secret bills of sale of personal chattels, whereby persons are enabled to keep up the appearance of being in good circumstances and possessed of property, and the grantees or holders of such bills of sale have the power of taking possession of the property of such persons to the exclusion of the rest of their creditors."

Section 1.
Registra-
tion.

To check such dishonest obtaining of credit, and to place at least within the reach of the inquiries of creditors and purchasers, knowledge of all transactions of the kind respecting personal chattels, the Act of 1854 provided that every absolute or conditional bill of sale of personal chattels, whereby the grantee or holder should have power, with or without notice, immediate or future, to seize or take possession of any property and effects subject to such bill of sale, should unless registered as therein directed within twenty-one days after the making thereof, be void as against the assignees in bankruptcy, or under an assignment for the benefit of creditors of the person whose goods were comprised in the bill of sale, and as against all sheriffs' officers and other persons seizing any property or effects comprised therein in the execution of any process of the Courts of law or equity, so far as regarded the property in or right to the possession of any personal chattels comprised in such bill of sale, which at or after the time of such bankruptcy, or the execution of such assignment for the benefit of creditors, or of the executing such process, and after the expiration of the twenty-one days should be in the possession, or apparent possession, of the person making such bill of sale (*m*).

Bill of sale
defined.

A bill of sale was defined as comprising assignments, transfers, declarations of trust without transfer, and other

assurances of personal chattels, and also powers of attorney, authorities, or licenses to take possession of personal chattels as security for any debt; but not comprising certain other specified dispositions, the most important of which are assignments for the benefit of creditors, and marriage settlements.

Personal chattels were somewhat vaguely defined as meaning goods, furniture, fixtures, and other articles capable of complete transfer by delivery, and as not including chattel interests in real estate, nor shares in stocks or public companies.

Personal
chattels
defined.

Apparent possession was also dimly explained as meaning the remaining or being in or upon any house, mill, &c., or other premises occupied by the giver of the bill of sale, or as being used or enjoyed by him in any place whatever (*n*).

Apparent
possession.

The great number and difficulty of the questions arising respecting the interpretation of this Act necessitated further legislation for their satisfactory solution. At the same time it was equally necessary to provide for and counteract some ingenious evasions of the Act which had been invented by keen practitioners. Hence the more detailed and stringent measure of 1878 (*o*).

It would occupy too much space here to quote in particular the provisions of this important statute, to which every student should refer for himself. It must suffice to summarize its effects.

41 & 42
Vict. c 31.

1. *As to registration.* This Act requires that the execution of every bill shall be attested by a solicitor of the Supreme Court, and that the attestation shall state that before its execution its effect was explained by the solicitor to the grantor; also that the bill with every schedule and inventory annexed thereto, with true copies of such bill and schedule or inventory, and of every attestation of its execution, and with an affidavit of the time of its execution and attestation, and a description of the residence and

Registra-
tion.

(*n*) s. 7.

(*o*) 41 & 42 Vict. c. 31.

occupation of the person giving the same and of the attesting witnesses, shall be filed with the registrar within seven clear days after the making or giving of such bill of sale. If two or more bills of sale are given comprising in whole or in part the same chattels, they shall have priority in order of the date of their registration as regards such chattels (*p*). Moreover, the registration of a bill of sale must be renewed every five years (*q*); and where a subsequent bill of sale is executed within or on the expiration of seven days after the execution of a prior unregistered bill of sale, and comprises all or any part of the personal chattels comprised therein, and is given as security for the same or any part of the same debt, such subsequent bill shall be absolutely void as regards such chattels and debt, unless proved to have been given *bonâ fide* to correct some material error in the prior bill of sale (*r*).

Definitions
bill of sale.

2. The definition of the term "bill of sale" is in the Act of 1878 somewhat amplified, being in particular expressed to include "inventories of goods with receipt thereto attached or receipts for purchase monies of goods," "and also any agreement whether intended or not to be followed by the execution of any other instrument by which a right in equity to any personal chattels or to any charge or security thereon shall be conferred" (*s*).

Personal
chattels.

3. The expression "personal chattels" is also more fully explained. Growing crops were held not to be within the Act of 1854 (*t*); and great difficulties arose in deciding what was a bill of sale of fixtures within the Act (*u*). The Act of 1878 has expressly provided for these cases by enacting that fixtures and growing crops when separately assigned or charged shall be deemed personal chattels; but not fixtures (except trade machinery as elsewhere described) when assigned together with a freehold or leasehold interest in any land or building to which they are affixed;

(*p*) s. 10.

(*q*) s. 11.

(*r*) s. 9.

(*s*) s. 4.

(*t*) *Brantom v. Griffiths*, 1 C. P. D.

349; 2 *ib.* 212.

(*u*) *Exp. Daylish*, 8 Ch. 1080;
Waterfall v. Perristone, 3 Jur. N. S.
17; 6 E. & B. 876.

nor growing crops when assigned together with any interest in the land on which they grow (*x*). Fixtures and growing crops are not to be deemed to be separately assigned or charged by reason only that they are assigned or charged by separate words, or that power is given to sever them, if by the same instrument any freehold or leasehold interest in the land or building to which they are affixed or in the land on which such crops grow, is also conveyed or assigned to the same persons or person (*y*).

Trade machinery is the subject of important new provisions. A detailed and exhaustive definition thereof is given, and it is expressly declared to be within the expression personal chattels.

4. The definition of the term "apparent possession" remains in the Act of 1878 the same as in that of 1854. Apparent
possession. The "occupation" must be a *de facto* occupation; mere tenancy without residence will not suffice (*z*), but if the debtor is allowed the use of the goods, notwithstanding the formal putting a man into possession for the grantee, the debtor is none the less deemed to be in apparent possession (*a*). *Secus*, however, if the man in possession really has control of the goods (*b*). Wrongful possession takes a case out of the Act (*c*).

It is enacted (*d*) that chattels comprised in a bill of sale which has been and continues to be duly registered under the Act shall not be deemed to be in the possession, order, or disposition of the grantor of the bill of sale within the meaning of the Bankruptcy Act, 1869.

It must suffice here to specify these salient points of importance in connexion with the Bills of Sale Acts, but the student is recommended to refer carefully to the Acts themselves, and he will find an exhaustive comparison and exposition of the two statutes in Coote on Mortgages, pp. 459—480, 4th edit.

(*x*) s. 4.

(*y*) s. 7.

(*z*) *Robinson v. Briggs*, 6 L. R.

Exch. 1.

(*a*) *Exp. Jay*, 9 Ch. 697; *Exp. Hooman*, 10 Eq. 63; *Exp. Lewis*, 6

Ch. 626.

(*b*) *Re Francis*, 10 Ch. D. 408,

414.

(*c*) *Exp. Fletcher*, 5 Ch. D. 809.

(*d*) s. 20.

SECTION II.—RIGHTS OF MORTGAGOR AND MORTGAGEE.

- I. *Mortgagor in Possession.*
- II. *Accounting.*
- III. *Remedies of Mortgagees.*
- IV. *Tacking.*

Marsh v. Lee.

Brace v. Duchess of Marlborough.

- V. *Consolidation.*

I. *Rights of a Mortgagor in Possession.*

Not ac-
countable
for profits.

While a mortgagor remains in possession he is not required to account for the rents and profits of the mortgaged estate (*e*); nor is his agent, or any person claiming under his voluntary revocable deed (*f*).

After
default
liable to
eviction.

He has not, however, an unrestricted power of dealing with the estate as its owner. As soon as default has been made, he is in the position of a tenant at will of the mortgagee; he is liable to eviction without any notice (*g*); and, herein differing from a tenant at will, he has no right to the emblements, these being part of the security (*h*).

Powers of
leasing.
44 & 45
Vict. c. 41

By 44 & 45 Vict. c. 41, s. 18, a mortgagor *in possession* is enabled to make certain leases valid against any incumbrancer, and a mortgagee in possession is enabled to make similar leases valid against all prior incumbrancers and the mortgagor. The leases so authorised are agricultural leases for twenty-one, and building leases for ninety-nine years, taking effect in possession not later than twelve months after date; they must reserve the best reasonable rent, and in other respects comply with the provisions of the Act. The Act comes into operation on the 1st Jan., 1882, and only applies to mortgages made

(*e*) *Colman v. D. of St. Albans*, 3 Ves. 25.

(*f*) *Hale v. Berley*, 20 Beav. 127.

(*g*) *Doe d. Roby v. Maisy*, 8 B. & C. 767.

(*h*) *Keech v. Hall*, Doug. 22.

after that date. These powers may, moreover, be excluded or increased by express contract. In cases not within the statute, neither mortgagor nor mortgagee could alone make a valid lease, unless, of course, power so to do was reserved by the deed (*i*), or under exceptional circumstances (*k*).

Since the produce of the land is considered as part of the security, a mortgagor in possession may be restrained by injunction from committing waste on the estate (*l*). A mortgagee is not indeed, as a matter of course, entitled to such an injunction; it is necessary for him to show that his security is likely to be prejudiced thereby, being already, or in consequence of the waste in danger of becoming, insufficient (*m*).

Mortgaged shares may qualify the mortgagor to act as a director of a company (*n*). The mortgagor of an advowson has, on the living becoming vacant, a right to nominate, and may compel the mortgagee to present his nominee, notwithstanding an express agreement to the contrary (*o*).

Previous to the Jud. Act, 1873 (*p*), a mortgagor, though in possession, could not sue in his own name to recover the land or its rent against a lessee to whom he had leased the land before the mortgage, nor could he sue a trespasser or other wrong-doer in his own name for damages. By this statute this disability has been removed, and it is enacted that "a mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land, as to which no notice of his intention to take possession, or to enter into the receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession or the recovery of such rents and profits, or to prevent or recover damages in respect of any trespass or

Mortgagor may be restrained from waste, if the security is thereby endangered.

Can sue in his own name under Jud. Act, 1873, s. 25, s.-s. 5.

(*i*) *Keech v. Hall*, Doug. 22.

(*k*) *Hungerford v. Clay*, 9 Mod. 1.

(*l*) *Farrant v. Lovell*, 3 Atk. 723.

(*m*) *King v. Smith*, 2 Ha. 239.

(*n*) *Pulbrook v. Richmond &c. Co.*,

9 Ch. D. 610.

(*o*) *Mackenzie v. Robinson*, 3 Atk. 558.

(*p*) 36 & 37 Vict. c. 66.

other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person (*q*).

II. *Accounting between Mortgagor and Mortgagee.*

Mortgagee in possession must account strictly. If no arrears when possession taken, annual rests.

1. The mortgagee, when in possession, must strictly account for the rents and profits of the mortgaged estate, and if he occupies any part of it himself he will be charged an occupation rent (*r*). If there be no arrears of interest due at the time he takes possession, and the rents and profits exceed the amount of the interest, the account will generally be taken with annual rests, so that the excess of rent may be annually applied in reducing the principal (*s*). And this applies as well in the case of an occupation rent as in that of other rents and profits (*t*).

Except in mortgage of leaseholds where security is deficient.

In the case, however, of a mortgage of leasehold property, where there is no reasonable certainty that the ground rent and insurance will be duly paid, or the houses kept in repair, the mortgagee is entitled to enter into possession even though no interest is in arrear; and in such a case annual rests will not be directed against him (*u*). The burden of proving the reasonableness of his entry into possession is, however, upon the mortgagee (*x*).

If interest in arrear, annual rests not directed.

If the interest is in arrear when the mortgagee enters into possession, annual rests will, as a rule, not be directed (*y*); and where the liability to account without annual rests has thus once commenced it continues on the same footing until changed by some further agreement (*z*). The fact that the arrears of interest are subsequently paid off does not of itself entitle the mortgagor to have rests directed in his favour (*a*). If, however, the whole of the

Until

(*q*) s. 25, sub-s. 5.

(*r*) *Smart v. Hunt*, 1 Vern. 418, n.

(*s*) *Shepherd v. Elliott*, 4 Mod. 254.

(*t*) *Wilson v. Metcalfe*, 1 Russ.

530.

(*u*) *Patch v. Wild*, 30 Beav. 99.

(*x*) *Ibid.*

(*y*) *Wilson v. Cluer*, 3 Beav. 136.

(*z*) *Scholfield v. Lockwood*, 32

Beav. 439.

(*a*) *Davis v. May*, G. Coop. 238; 19 Ves. 383.

debt is paid off by the receipt of the rents, from that whole debt is paid off.
time annual rests will be decreed (*b*).

2. A mortgagee in possession who sells part of the mortgaged property under a power of sale in the mortgage, must apply the proceeds of sale, first in payment of interest and costs, and then either pay the balance to the mortgagor, or apply it in reduction of the principal due on the mortgage (*bb*). A rest will always be directed at the time of the sale if any surplus of sale money beyond the interest and costs is retained by the mortgagee, notwithstanding that interest may have been in arrear when he entered into possession (*c*). Application of proceeds of sale.

3. A mortgagee in possession holding over after payment of his claims will be charged with any surplus receipts, and with simple interest at four per cent. thereon (*d*). The Court may in its discretion direct compound interest (*e*). Mortgagee holding over after full payment.

In accounting, a mortgagee in possession is, as a rule, only liable for fair rents and profits, or for what he has actually received. If, however, he has been guilty of wilful default in not receiving them, as by turning out a good tenant, or by letting at less than is offered, he will be charged with what he might have received (*f*). Mortgagee only charged with what he actually receives.

4. A mortgagee in possession is liable to account for any damage done to the property, as by pulling down buildings improperly (*g*), or by destroying or losing the title deeds (*h*). On the other hand, he will be allowed for money laid out in necessary repairs, with interest thereon (*i*). So also he will be allowed the costs of protecting the title of the mortgagor (*k*). Account of damages, expenditure,

5. Further, he will be allowed for moneys laid out *with* and *the mortgagor's consent or acquiescence* in the improvement paid for

(*b*) *Wilson v. Cluer*, *sup.*

493; *Parkinson v. Hanbury*, 2 L.

(*bb*) And see 44 & 45 Vict. c. 41, s. 21.

R. H. L. 1.

(*c*) *Thompson v. Hudson*, 13 Eq. 497.

(*g*) *Sandon v. Hooper*, 6 Beav. 246.

(*d*) *Quarrel v. Beckford*, 1 Madd. 269.

(*h*) *Brown v. Sewell*, 11 Ha. 49.

(*i*) *Sandon v. Hooper*, *sup.*; *Eyre v. Hughes*, 2 Ch. D. 148.

(*e*) *Wilson v. Metcalfe*, *sup.*

(*k*) *Sandon v. Hooper*, *sup.*; *Parker v. Watkins*, Johns. 133.

(*f*) *Hughes v. Williams*, 12 Ves.

improvements consented to. ment of the property (*l*). He may not, however, lay out money so as largely to increase the value of the property, and thus place it beyond the power of the mortgagor to redeem (*m*).

Speculative outlay not required, or proper. He is not bound to engage in any speculative adventure for the benefit of the estate, as by opening mines or quarries (*n*), which must be at his own risk and hazard. If mines are already opened, he should not make large outlay in improving them (*o*).

Waste only allowed when security insufficient. 6. Until recently it was only when a mortgaged estate was insufficient in value to pay the mortgage, that a mortgagee in possession might open mines and cut timber (*p*). If, having a sufficient security, he committed such waste, he was charged with the gross receipts, and disallowed the expenses of working (*q*). Now he is empowered when in possession to cut and sell timber and other trees ripe for cutting, not planted or left for shelter or ornament. This applies only to mortgages made after Dec. 31st, 1881.

Property must be preserved. A mortgagee in possession is responsible for the integrity of the property; thus a mortgagee was required to account for the proceeds of coal dug from the mortgaged land by the trespass of adjacent coal-owners (*r*). Formerly a mortgagee of houses could not insure them against fire at the mortgagor's expense in the absence of an express agreement with him, nor could he require the mortgagor to insure them. The power to insure and add the premiums to the mortgage debt was given by Lord Cranworth's Act (*s*); and by 44 & 45 Vict. c. 41, ss. 19 and 23, this power is confirmed and regulated, the insurance money being limited, in the absence of stipulations to the contrary, to two-thirds the value of the property.

Employment of mortgaged ship. 7. The mortgagee in possession of a ship is not chargeable, if in the exercise of a fair discretion he refrains from

(*l*) *Trimleston v. Hamill*, 1 Ba. & Be. 385.

(*m*) *Sandon v. Hooper*, 6 Beav. 246.

(*n*) *Hughes v. Williams*, 12 Ves. 493.

(*o*) *Rowe v. Wood*, 2 J. & W. 553.

(*p*) *Millett v. Davy*, 31 Beav. 470.

(*q*) *Ibid.*

(*r*) *Hood v. Easton*, 2 Giff. 692.

(*s*) 23 & 24 Vict. c. 145, s. 11.

selling it; and if he cannot reasonably effect a sale, he may employ the ship in accordance with the ordinary course of business (*t*).

8. A mortgagee is allowed his costs of an action of redemption or foreclosure; they will be taxed as between party and party (*u*). Costs as between party and party.

III. Remedies of the Mortgagee.

1. A mortgagee, being the legal owner of the estate, is on default of payment entitled at law to immediate possession, or to the receipt of the rent if the land be in lease; and equity will not interfere to prevent him from pursuing his remedy. He may enter into possession at any time, and without notice (*v*). Mortgagee entitled to possession.

2. He has also, of course, a right at any time after payment of the debt has become due, to sue the mortgagor for the money. Moreover, as it would be unjust that a mortgagee should be subject to a perpetual account by the perpetual continuance of the mortgagor's equity of redemption, he is allowed, after giving a reasonable notice for the payment of the debt, to come into equity and sue for the foreclosure of the equity of redemption; in other words, he may seek a decree which will give him the entire equitable as well as the legal interest in the property; or in the alternative, he may seek the enforcement of a sale of the estate. May sue for the debt, and for foreclosure or sale.

3. An additional remedy is sometimes provided for a mortgagee by the insertion in the mortgage deed of an attornment clause, that is, a proviso that in case default shall be made in payment of the mortgage debt, the mortgagor shall continue to remain in possession as a tenant of the mortgagee, paying a certain specified rent, Attornment clause.

(*t*) *Marriott v. The Anchor &c. Co.*, 2 Giff. 457; 3 De G. F. & J. 177.

E. 8.

(*v*) Per Sir W. Grant, M. R. 2 Mer. 359; *Lows v. Telford*, 1 App.

C. 414.

(*u*) *The Kestrel*, 1 L. R. A. &

usually the same in amount as the interest. This provision enables the mortgagee, if necessary, to utilise the special remedy provided for the recovery of rent by landlords; namely, distraint. Whether the rent reserved equals or exceeds the interest, the mortgagee has a *prima facie* right to apply the proceeds of a distress in satisfaction of principal as well as interest (*w*). The rent reserved must, however, be of reasonable amount with regard to the value of the premises (*x*). If it is exorbitant, or the attornment is expressed only to come into operation on bankruptcy, it will be deemed a fraudulent preference and void (*y*).

Distrait.

Rent must be reasonable, not amounting to fraudulent preference.

4. The remedies of foreclosure and sale being equitable are subject to equitable conditions which require detailed consideration.

Action for foreclosure. Usual form.

(1.) The usual course pursued on foreclosure is for the mortgagee to bring his action praying that an account may be taken of the principal debt and interest, that the defendant may be decreed to pay the same with costs by an early day to be appointed by the Court, and that in default thereof he may be foreclosed his equity of redemption. If there are prior incumbrances, he must also offer to redeem them (*z*). On the defence coming in there is a reference to chambers to take the account, and a judgment is made for payment of principal, interest, and costs within six calendar months after the chief clerk's certificate of what is due on the account, or in default that the mortgagor shall stand foreclosed. If default is made the order for foreclosure is made absolute; and on being signed and inrolled the foreclosure is complete (*a*).

Sale (under 15 & 16 Vict. c. 86) may be directed in discre-

(2.) Before the passing of the Chancery Amendment Act (*b*), Courts of equity would not, as a rule, decree a sale instead of a foreclosure of the mortgaged estate against the wish of the mortgagor. If the estate was situate in

(*w*) *Exp. Harrison*, 18 Ch. D. 127.

(*x*) *Re Stockton &c. Co.*, 10 Ch. D. 335.

(*y*) *Exp. Williams*, 7 Ch. D. 138 ;
Exp. Jackson, 14 Ch. D. 725.

(*z*) *Inman v. Wearing*, 3 De G. & Sm. 729.

(*a*) Coote, 991.

(*b*) 15 & 16 Vict. c. 86.

Ireland or the Colonies, or if it was a dry reversion or an advowson, or the security was insufficient, they might have done so (c). But by that Act the Court of Chancery was empowered to direct a sale in any case, on such terms as it might think fit (d). Wherever there is such complication of interests that the common foreclosure decree cannot be conveniently worked, or it is manifestly for the benefit of all parties, a sale has since been usually directed (e). And it may be directed at once, without the concurrence of the mortgagor (f).

(3.) Even before the statute, in the case of a foreclosure suit against an infant heir or devisee of the mortgagor, there was, with the mortgagee's consent, usually an inquiry whether foreclosure or sale would be more beneficial for the infant (g); though the mortgagee might have insisted on a foreclosure (h). The decree is binding on the infant, unless on being served with a subpœna to show cause against the same, he shall within six months after attaining his majority show to the Court good cause to the contrary. This he must do by putting in a new defence, and showing error in the decree (i). The same rule, however, does not apply to married women, against whom the ordinary procedure is employed, without a day being given to show cause (k).

(4.) Even after a foreclosure has been absolutely decreed, signed, and enrolled, the Court will show indulgence to the mortgagor by enlarging the time for payment, if a proper case can be shown, and the security be not deficient (l). There must, however, be a strong reason shown, and an immediate payment of interest and costs (m). A decree

tion of the Court.

Where heir or devisee of mortgagor is an infant.

Day to show cause.

Time may be enlarged after decree;

or decree

(c) Coote, 992-3.

(d) s. 48.

(e) *Hurst v. H.*, 16 Beav. 372.

(f) *Newman v. Selfe*, 33 Beav. 522.

(g) *Mondey v. M.*, 1 V. & B. 223.

(h) *Williamson v. Gordon*, 19 Ves. 114.

(i) *Mallock v. Galton*, 3 P. Wms.

352; *Davis v. Dowding*, 2 Keen, 245.

(k) *Mallock v. Galton*, *sup.*

(l) *Thornhill v. Manning*, 1 Sim. N. S. 451; *Cocker v. Beris*, 1 Ch. Ca. 61.

(m) *Coombe v. Stewart*, 13 Beav. 111.

reopened
under
special
circum-
stances.

of foreclosure has been reopened even after the mortgagee has been in possession sixteen years (*n*); but only under special circumstances, such as fraud or collusion in obtaining the decree (*o*).

Power of
sale, and
appoint-
ment of a
receiver,
under
23 & 24
Vict. c. 145,
incident to
every
mortgage.

(5.) The necessity for a foreclosure suit is generally obviated by the insertion of a power of sale in the mortgage deed; a power, however, which in no way prejudices the right to foreclosure (*p*). By Lord Cranworth's Act (*q*), a power of sale, and a power to require the appointment of a receiver, were rendered incident to every mortgage or charge by deed affecting any hereditaments of any tenure or any interest therein, executed after the 28th August, 1860. By 44 & 45 Vict. c. 41, ss. 19, 20, these powers have been confirmed. The power of sale, however, cannot be exercised until notice requiring payment of the mortgage money has been served on the mortgagor, and default has been made in payment thereof for three months after such service, *or* until some interest under the mortgage is in arrear and unpaid for two months after becoming due, *or* until there has been a breach of some provision contained in the mortgage or in this Act other than a covenant for payment of the mortgage money and interest. Under the previous Act, which still governs mortgages executed previously to the 1st of January, 1882, six months' notice in writing was required, and the power could not be exercised until the principal debt had been due a year, or the interest was in arrear six months. In both cases the powers in question may be excluded by express stipulation.

44 & 45
Vict. c. 41.

remedies
may be
pursued
con-
currently.

5. The general rule of equity has been that a party suing at law cannot sue in equity at the same time. A mortgagee has, however, always been permitted to pursue all his remedies at the same time. He may at once eject

(*n*) *Burgh v. Langton*, 5 Bro. P. C. 213.

(*p*) *Slade v. Rigg*, 3 Ha. 35.

(*q*) 23 & 24 Vict. c. 145, ss. 11—

(*o*) *Lloyd v. Mansel*, 2 P. Wms. 16.
73.

the mortgagor, sue on the covenant for payment in his deed, and on a bond given as a collateral security, and also proceed in equity for foreclosure or sale. If he obtains full payment on the bond or covenant, or by receipt of the rents and profits, the mortgagor is entitled to redeem the estate, and there can be no foreclosure or sale; but if only partially paid, he may still go on and foreclose (*u*).

On the other hand, if he first forecloses, it depends on circumstances whether, on alleging that the estate is insufficient to satisfy his debt, he will be allowed to go on with a personal action for the balance. The effect of such a personal action must be to reopen the foreclosure, and give the mortgagor a renewed right to redeem. If, then, the mortgagee still has the estate in his power, there is no objection to his action; only on payment of the whole debt he must reconvey the estate to the mortgagor. If, on the contrary, he has so dealt with the mortgaged estate as to be unable to restore it on tender of full payment—for instance, if he has sold it—he can no longer sue for the mortgage money (*x*). Hence it is evident that his safest course is first to pursue his legal remedies, and then to have recourse, if necessary, to those of equity.

6. If a mortgagor sues for redemption of a *legal* mortgage, and the action is dismissed for any reason except for want of prosecution, the dismissal operates as a decree of foreclosure against him. The action admits the debt and admits the mortgagee's title; being dismissed he cannot again sue for the same object, and the result is in effect foreclosure (*y*). The dismissal, however, of the similar action respecting an equitable mortgage would not have the same effect (*z*).

7. The following limitations affect the remedies of the mortgagee:

(*u*) *Palmer v. Hendrie*, 27 Beav. 349, 351.

(*x*) *Lockhart v. Hardy*, 9 Beav. 349; *Palmer v. Hendrie*, *sup.*;

28 Beav. 341.

(*y*) *Marshall v. Shrewsbury*, 10 Ch. 250.

(*z*) *Ibid.*

3 & 4
Will. IV.
c. 27, s. 40.

By 3 & 4 Will. IV. c. 27, it is enacted that after the 31st of December, 1833, no action, suit, or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, but within twenty years next after a present right to receive the same shall have accrued, unless in the meantime some part of the principal money or some interest thereon shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and in such case no such action or suit or proceeding shall be brought but within twenty years after such payment or acknowledgment (*a*). By 37 & 38 Vict. c. 57, this is repealed, but is re-enacted with the substitution of twelve years for twenty as the period of limitation.

37 & 38
Vict. c. 57.

It has been recently held that a foreclosure action is an action to recover land, and not money secured (*b*); but by the combined effect of 1 Vict. c. 28, and 37 & 38 Vict. c. 57, the period of limitation is the same as that for the recovery of money.

3 & 4
Will. IV.
c. 27, s. 42.

Again, s. 42 of 3 & 4 Will. IV. c. 27, provides that no rent or interest in respect of any sum of money charged upon land or rent shall be recovered by any distress or action but within six years next after the same shall have become due, or shall have been formally acknowledged by the debtor or his agent.

3 & 4
Will. IV.
c. 42.

And by 3 & 4 Will. IV. c. 42, it is enacted that all actions of covenant or debt upon any bond or specialty shall be sued and brought within twenty years after the cause of such actions and suits, or within twenty years after an acknowledgment by deed, or part payment, or part satisfaction.

Effect of
the
statutes.

These limitations remain unaffected by the more recent statute. The result is, that in the absence of a covenant or collateral bond securing a mortgage debt, an action for its

(*a*) s. 40.

(*b*) *Harlock v. Ashberry*, 18 Ch. D. 229.

recovery must be brought within twelve years from the accruing of the right, or of an acknowledgment or payment on account thereof; an action for foreclosure must be brought within the same period; and an action for arrears of rent or interest within a period of six years. If, however, there is the additional security of a bond or covenant, the period of limitation of the personal remedy thereunder is twenty years.

Formerly, if a trust term was created or agreed to be assigned for securing the payment of principal and interest, express trusts being excepted from the Statutes of Limitation, the amount of arrears recoverable was not limited to six years; nor was an action for the principal limited to twenty years (b). But by s. 10 of 37 & 38 Vict. c. 57, this effect of the security of an express trust was removed, and in such a case the limitation as against the land is now the same as if there were no trust (c). As against the trustee it remains as before the statute.

Trust term
for pay-
ment
formerly
excepted
from
limitation.

IV. *Tacking of Mortgages.*

The case usually cited as the leading authority on the doctrine of tacking is

MARSH v. LEE.

[2 Ventr. 337; 1 W. & T. L. C. 659.]

In this case one English being seized of the manor of Wicksall and of the manor of Monfield, mortgaged in 1649 part of the manor of Wicksall to Burrell for £1000. Afterwards, in 1655, he acknowledged a statute to Burrell of £800 for the payment of £400. In 1662 English mortgaged both the manors to Mrs. Duppa for £7000. In 1665 English mortgaged the manor of Wicksall to Lee for £7000. Lee had no notice of the former mortgages, but he subsequently purchased Burrell's incumbrances.

The Lord Keeper Bridgeman, assisted by Hale, C.B., and Rainsford, J., held that Lee might make use of these

(b) *Cox v. Dolman*, 2 De G. M. & G. 592.

(c) *Fisher, Mtg.*, p. 365, ed. 3.

incumbrances to protect his own mortgage, for that he had both law and equity on his side. He had law for that he had a precedent mortgage in 1649, and also the statute in 1655; so that, while these remained in force Marsh could not come in. He had equity, for he having a subsequent mortgage, yet it being without notice, he ought to be relieved in this Court.

Principle
of tacking.

The doctrine of tacking rests upon and illustrates two familiar maxims of equity—(1.) He who seeks equity must do equity: (2.) Where equities are equal the law shall prevail. It is equity that a debtor who has received a loan on the security of an estate shall, when he seeks to redeem his estate, pay all the debts which he owes to his creditor. If in the meantime the debtor has borrowed money from other persons on the same security, and the first creditor having the legal estate therein has subsequently without notice made further advances to the debtor, he has law and equity on his side, and may tack his subsequent advance to his original debt, notwithstanding that it may happen to prejudice an intermediate incumbrancer who has only an equitable security. Further, if a person lends his money only upon an equitable security, but without notice of any prior charge, he may, after receiving notice of such a charge, protect his security by purchasing the legal estate from a first incumbrancer; his loan without notice giving him an equal equity, and his securing the legal estate giving him a preference at law. The subject naturally resolves itself into two inquiries: first, as to the principles of tacking as against the mortgagor and his representatives; secondly, as to the principles of tacking as against *mesne* or intermediate incumbrancers.

Mortgagor
on redemption
must pay principal,
interest,
and costs.
What costs
included.

1. *Tacking as against the mortgagor and his representatives.*

A mortgagor must, before redemption, pay not merely the principal and interest of the mortgage debt, but also all the proper costs incurred by the mortgagee. And these costs include not only his costs of suits for redemption or

foreclosure, but all costs necessarily incurred by the mortgagee in maintaining the title to the estate (*c*), and generally those costs to which we have above seen that he is entitled in his accounts.

A mortgagee may, however, not only be refused his costs, but may even have to pay the costs of the mortgagor if he has necessitated a suit by refusing a tender of the full amount due (*d*), or by setting up a groundless defence (*e*), or has otherwise been guilty of vexatious conduct (*f*). Mortgagee may even have to pay costs.

Again, the mortgagee cannot be deprived of his pledge without payment of all sums of money due to him from his debtor which form a general or specific lien on the land; if, therefore, the mortgagee advance money by way of further charge or on a judgment, neither the mortgagor, nor, as a rule, any one claiming under him, though for valuable consideration and without notice, can redeem without payment of the full amount (*g*). And equitable liens and charges may, equally with legal ones, be thus tacked to the original mortgage debt; for instance, an agreement for a mortgage, or an informal mortgage (*h*). Mortgagor must pay all debts forming a specific lien on land.

Equitable as well as legal.

The test as to the application of the doctrine of tacking, as against the mortgagor, is whether the further advance was made on the security of the land. If so it may be tacked; if not, as against the mortgagor it cannot (*i*). Thus, though under a covenant in his mortgage, a mortgagor may, by virtue of 3 & 4 Will. IV. c. 42, be able to recover twenty years' interest, yet since by 3 & 4 Will. IV. c. 27, he is only entitled to six years' arrears against the land, he cannot tack more than this against the mortgagor, for the covenant creates no lien upon the land (*k*). On the same principle a bond debt, and *a fortiori* a simple contract debt, cannot be tacked as against a mortgagor (*l*). As against the mortgagor the question is: Was the further advance made on security of the land.
Only six years' interest can be tacked.
Not bond or simple contract debts.

(*c*) *Godfrey v. Watson*, 3 Atk. 518.

(*d*) *Roberts v. Williams*, 4 Ha. 129.

(*e*) *Harvey v. Jebbutt*, 1 J. & W. 197.

(*f*) *Moore v. Painter*, 6 Jur. 903.

(*g*) *Coote*, 807.

(*h*) *Matthews v. Cartwright*, 2 Atk. 347.

(*i*) *Lacy v. Ingle*, 2 Ph. 413.

(*k*) *Hunter v. Nockolds*, 1 Mac. & G. 640.

(*l*) *Coleman v. Winch*, 1 P. Wms. 777; *Jones v. Smith*, 2 Ves. jr. 376.

Secus as against mortgagor's representatives.

Against them all debts may be tacked.

But as against the representatives of a mortgagor the case rests on a different principle. Thus in the case of a bond debt, whether prior or subsequent to the mortgage, the heir and beneficial devisee of the debtor having been made by 3 & 4 Will. & M. c. 14, jointly liable for its payment, in order to avoid circuity and multiplicity of actions the bond debt was allowed to be tacked to the mortgage as against them (*m*). And on the same principle twenty years' arrears of interest may be tacked as against the heir or devisee of the mortgagor, if secured by a covenant in the mortgage deed binding the heirs (*n*), though only six years' arrears could be tacked as against the mortgagor himself.

Again, since 3 & 4 Will. IV. c. 104, which made real estate liable to simple contract debts, such debts may be tacked by any mortgagee of freehold or copyhold against the heir or devisee, in any cases in which there is not a devise for payment of debts (*o*). And similarly a mortgagee of a lease may tack a simple contract debt against the executor (*p*). But in neither case can a simple contract debt be tacked as against a creditor coming to redeem (*q*).

2. *Tacking as against mesne incumbrancers.*

In this branch of the subject perhaps the most important authority that can be cited is the well-known case of

BRACE v. THE DUCHESS OF MARLBOROUGH

[2 P. Wms. 491],

Rules in *Brace v. Duchess of Marlborough*.
1. Third

in which Sir Joseph Jekyll, M.R., laid down the following series of rules in exposition of the whole doctrine:—

(1.) "If a third mortgagee buys in the first mortgage, though it be *pendente lite*, pending a bill brought by the

(*m*) *Heams v. Bance*, 3 Atk. 630 ; *Shuttleworth v. Laycock*, 1 Vern. 245.

(*n*) *Elcy v. Norwood*, 5 De G. & S. 240.

(*o*) *Rolfe v. Chester*, 20 Beav. 610.

(*p*) *Coleman v. Winch*, 1 P. Wms. 776 ; *In re Haselfoot's Estate*, 13 Eq. 327.

(*q*) *Adams v. Claxton*, 6 Ves. 226 ; *Talbot v. Frere*, 9 Ch. D. 568.

second mortgagee to redeem the first, yet the third mortgagee having obtained the first mortgage and got the law on his side and equal equity, he shall thereby squeeze out the second mortgagee; and this Lord Chief Justice Hale called a plank gained by the third mortgagee, or a *tabula in naufragio*, which construction is in favour of a purchaser, every mortgagee being such *pro tanto*.”

This rule is that established by the earlier case of *Marsh v. Lee* (r), and includes the stronger case of a first and legal mortgagor making a further advance without notice of a second mortgage. There are certain limitations of the rule which require attention. Thus there can be no tacking unless both the securities are held by the creditor in the same right. He cannot tack a mortgage which he holds for his own benefit to one assigned to him as trustee for another person (s). Similarly the executor of a first mortgagee who had the legal estate in his own right, was not suffered as against a *mesne* incumbrancer to tack a mortgage of the equity of redemption which had vested in his testator as executor of another.

No priority can be gained by the transfer of the legal estate by a person who holds it on an express trust for the first incumbrancer. The purchaser, in such a case, himself becomes a trustee (t). Similarly an incumbrancer getting in the legal estate from a person who is trustee for all the incumbrancers, with notice of their rights, gains no priority. The trustee is not to alter the priorities by preferring one of his *cestui que trusts* and conveying the legal estate to him (u). On the same principle it has been held that no priority is gained by the transfer, with notice of other incumbrances, of a satisfied mortgage, the legal mortgagee becoming on payment of his debt a mere trustee without any pecuniary interest (x); but in some

mortgagee purchasing first mortgage may tack.

A fortiori first mortgagee making further advance without notice may tack; but creditor must hold both securities in the same right.

Conveyance of legal estate by express trustee does not give priority.

Nor does transfer of a satisfied mortgage.

(r) 2 Ventr. 337.

(s) *Morret v. Paske*, 2 Atk. 52; *Shaw v. Neale*, 6 H. L. 581.

(t) *Allen v. Knight*, 5 Ha. 272; *Mumford v. Stohwasser*, 18 Eq. 556,

563.

(u) *Sharples v. Adams*, 32 Beav. 213; *Maxfield v. Burton*, 17 Eq. 15.

(x) *Carter v. C.*, 3 K. & J. 617; *Prosser v. Rice*, 28 Beav. 68, 74.

Notice by second mortgagee to first does not prevent tacking by the third mortgagee.
 2. Judgment creditor cannot tack a mortgage to his judgment; the first sum not being lent on the security of the land.

circumstances the Court has refused to interfere to take away the privilege of the legal estate (*y*). It is clearly settled that notice given to the first mortgagee by the second, will not prevent the third mortgagee from tacking the third mortgage to the first if he purchases it (*z*).

(2.) The second rule is, "If a judgment creditor, or creditor by statute or recognizance, buys in the first mortgage, he shall not tack or unite the mortgage to his judgment, &c., and thereby gain a preference; for such a creditor cannot be called a purchaser, nor has he any right to the land; he has neither a *jus in re* nor a *jus ad rem*. All that he has by the judgment is a lien upon the land, but *non constat* whether he will ever make use thereof, &c. Besides which the judgment creditor does not lend his money on the immediate view or contemplation of the land, nor is he deceived or defrauded though his debtor had before made twenty mortgages of his estate; whereas a mortgagee is defrauded or deceived if the mortgagor before that time mortgaged his land to another."

The distinction here drawn between the specific lien of a mortgagee and the general lien of a judgment creditor, as regards tacking, seems to be sound in principle, and is well established (*a*); it has not been affected by 1 & 2 Vict. c. 110 (*b*). Since 27 & 28 Vict. c. 112, the land is not affected by a judgment, and no right to tack could be supposed to arise, until the land is delivered in execution by writ of *elegit* or otherwise; and when there has been actual delivery, even a prior mortgagee, though without notice of the *elegit*, could not tack a subsequent charge to his first mortgage (*c*).

The rule would seem to apply equally to prevent a prior judgment creditor from tacking a subsequent incumbrance,

(*y*) *Pilcher v. Rawlins*, 7 Ch. 259, 274; and see p. 288.

(*z*) *Peacock v. Burt*, 4 L. J. N. S. Ch. 33.

(*a*) *Exp. Knott*, 11 Ves. 617.

(*b*) *Whitworth v. Gaugain*, 3 Ha. 416.

(*c*) *Champneys v. Burland*, 19 W. R. 148

and to prevent a subsequent judgment creditor from tacking a prior incumbrance (c).

(3.) The third rule is that if the first mortgagee lends (without notice) a further sum to the mortgagor upon a statute or judgment, he shall retain against a *mesne* mortgage until both his securities are satisfied.

3. A mortgagee may tack a judgment to his mortgage.

This is the converse of the last rule, and is supported by the converse of the reasoning there employed, for in this case the mortgagee does originally lend his money especially upon the security of the land, and may be considered to rely thereupon for all his debt (d). If, however, the mortgage is paid off before the judgment is recovered, although no reconveyance may have been made, the judgment cannot be tacked (e).

Unless the mortgage has been satisfied.

It will be observed that in all these cases there is no right to tack if at the time of advancing his money the mortgagee had notice of an existing incumbrance. It is the same in the case of a third mortgagee purchasing the first legal mortgage, and in the case of a first mortgagee seeking to tack a further advance, even if the first mortgage was expressly made to secure a sum and further advances (f). Thus a first mortgagee cannot tack a subsequent debt incurred *pendente lite* (the *lis pendens* being duly registered), because the suit would affect him with notice of the *mesne* incumbrance (g). The fact is that if there is notice at the time of the advance the equities are not equal; and then the possession of the legal estate will not prevail.

In these cases tacking prevented by notice.

(4.) The last rule in *Brace v. The Duchess of Marlborough* is: "When a *puisne* incumbrancer buys in a prior mortgage in order to unite the same to the *puisne* incumbrance, but it is proved that there was a mortgage prior to that, the Court clearly holds that the *puisne* incum-

4. Where the legal estate is outstanding the priority follows the order of time,

(c) Coote, 820.

26 Beav. 548.

(d) See also *Shepherd v. Titley*, 2 Atk. 348, 352; *Lloyd v. Atwood*, 3 De G. & J. 614.

(f) *Shaw v. Neale*, 20 Beav. 157; 6 H. L. 581.

(e) *Marquis of Brecon v. Seymour*,

(g) *Morret v. Paske*, 2 Atk. 53.

brancer where he had not got the legal estate, or where the legal estate was vested in a trustee, could there make no advantage of his mortgage; but in all cases where the legal estate is standing out, the several incumbrancers must be paid according to their priority in point of time." In other words, where, owing to the outstanding of the legal estate, the maxim "where there is equal equity the law must prevail" does not apply, then the maxim "*qui prior est tempore potior est jure*" applies.

unless one incumbrancer has a better right to call for it.

There is, however, a modification of this rule when one of the incumbrancers, though he has not the legal estate, has from the circumstances of the case a better right to call for it than another; for instance, if a declaration of trust has been made in his favour, or if he has secured possession of the title deeds (*h*). If this is the case, equity will place him in the same situation as if he had an actual assignment (*i*). And the result is the same where an incumbrancer obtains the legal estate after advancing his money in pursuance of a contract for a legal mortgage entered into at the time of the advance (*k*).

Bond and simple contract debts not tacked against a *mesne* incumbrancer.

We have seen that bond and simple contract debts, not being specific liens on the land, cannot be tacked as against the mortgagor himself. *A fortiori*, whether prior or subsequent to the mortgage, they cannot be tacked as against any intervening incumbrancer, whether a mortgagee or judgment or bond creditor (*l*).

37 & 38 Vict. c. 78.

The whole doctrine of tacking was displaced for a short time by the Vendor and Purchaser Act, 1874 (*m*), which enacted that from the 7th of August, 1874, no priority should be given or allowed to any interest in land by reason of such interest being protected by or tacked to the legal estate in such land. This enactment was, however, only

(*h*) *Wyndham v. Richardson*, 2 Ch. Ca. 213.

(*i*) *Pomfret v. Windsor*, 2 Ves. sr. 472, 486; *Wilmot v. Pike*, 5 Ha. 14, 22.

(*k*) *Cooke v. Wilton*, 29 Beav. 100.

(*l*) *Windham v. Jennings*, 2 Ch. Rep. 247; *Lowthian v. Hasel*, 3 Bro. C. C. 162.

(*m*) 37 & 38 Vict. c. 78.

in operation until the 31st of December, 1875, from which time it was repealed by the Land Transfer Act, 1875 (*n*). 38 & 39
Vict. c. 87.

V. Consolidation of Mortgages.

1. The doctrine of the consolidation of mortgages must be carefully distinguished from that of tacking. The principle of tacking applies as between successive incumbrances on one estate. The term consolidation of mortgages is applied to the general rule that where a mortgagor has mortgaged more than one estate to his mortgagee, he cannot claim to redeem one mortgage without redeeming all. This rule, which applies equally to redemption and foreclosure suits, to legal and equitable mortgages, and to real and personal property, may be thus concretely illustrated: A. mortgages Blackacre to B. for £1000, Blackacre being worth say £1500. Then A. further mortgages Whiteacre to B. for £500, and Whiteacre is found to be worth only £100. A. cannot then claim to redeem Blackacre, where the security is ample, alone. If he seeks to do so, he must also be prepared to redeem Whiteacre, which is an insufficient security for the money originally charged upon it (*o*). Consolidation distinguished from tacking.

Illustration.

2. And this doctrine of consolidation has been carried far beyond the simple case of a mortgage of two estates by one person to another. Thus if A. sells Blackacre, or mortgages the equity of redemption of it to C., whether with or without notice of the existence of the other mortgage, the purchaser is just as much as A. himself bound by B.'s right to consolidate (*p*). Even where the mortgage of Whiteacre was effected after the sale or second mortgage to C., B. was held entitled to consolidate (*q*). That this may work great hardship on a second mortgagee or purchaser is very Effect of notice.

(*n*) 38 & 39 Vict. c. 87.

(*o*) *Selby v. Pomfret*, 1 J. & H. 336; 3 De G. F. & J. 595; *Phillips v. Gutteridge*, 4 De G. & J. 531.

(*p*) *Beever v. Luck*, 4 Eq. 537;

Titley v. Davies, 2 Y. & C. Ch. 399, n.

(*q*) *Vint v. Padyet*, 1 Giff. 446; 2 De G. & J. 611.

evident. Thus, referring again to the figures above employed in illustration, C., not having any notice of the improvident mortgage of Whiteacre, may imagine that he is perfectly secure in giving £400 for, or lending it on a second mortgage of Blackacre. He would clearly be so if that estate could be redeemed alone. But he finds on seeking to do this, that B. can consolidate with the mortgage of Blackacre the mortgage of Whiteacre, which is worth £400 less than what was lent thereupon; and the result is that C.'s purchase or security is worth him nothing at all.

First mort-
gages
made to
different
persons.

Again, the principle applies although the first mortgages of the several estates were originally made to different mortgagees, but have by transfer come into the hands of one mortgagee; for instance, if A. mortgages Blackacre to B., and Whiteacre to C., and C. afterwards assigns his mortgage to B. (*r*), or, *vice versa*, B. assigns his mortgage to C. (*s*). But it has been held that consolidation cannot be insisted on if the equity of redemption of the one estate has been sold or mortgaged previous to the transfer which brings the two mortgages to the same hand (*t*): *à fortiori*, if such sale or mortgage takes place previous to the creation of the mortgage of the other estate (*u*). In this case the knowledge of the possibility of the mortgages coalescing cannot be imputed to the second mortgagee or purchaser of the first estate. The case is yet stronger if at the time of the assignment the assignee had notice of the *puisne* mortgage (*x*). These cases in effect overrule the decision in *Tussell v. Smith* (*y*), and to a certain extent that in *Beevor v. Luck* (*z*), cases which for a long time bore very hardly upon purchasers and mortgagees of equities of redemption.

Consolidation in
bankruptcy.

3. A mortgagee may on the bankruptcy of the mortgagor, if his trustee does not at once redeem, take a transfer of a

(*r*) *Tweedale v. T.*, 23 Beav. 341.

(*s*) *Titley v. Davies*, 2 Y. & C. Ch. 399, n.

(*t*) *Willie v. Lugg*, 2 Ed. 78.

(*u*) *White v. Hillacre*, 3 Y. & C.

Exch. 597; *Mills v. Jennings*, 13 Ch. D. 639, 646.

(*x*) *Baker v. Gray*, 1 Ch. D. 491.

(*y*) 2 De G. & J. 713.

(*z*) 4 Eq. 537.

mortgage on another of his estates and consolidate it with a debt due on his own mortgage, and may thus hold the two estates as a security for both debts (a). He could not, however, take an original mortgage after notice of insolvency, as that would amount to a fraudulent preference (b).

4. There can be no consolidation where the transactions in question are not between the same parties or persons claiming through them (c); so there can be no consolidation where one mortgage is by a firm, and the other by one of the partners thereof (d). This case also decides that there can be no consolidation where there has been no default in respect of one of the mortgages, for until default the estate is not at law forfeited.

5. The recent Conveyancing and Law of Property Act 44 & 45 Vict. c. 41, s. 17. in effect abrogates the principle of Consolidation as far as concerns mortgages executed after Dec. 31st, 1881. It enacts that a mortgagor seeking to redeem any one mortgage shall be entitled to do so without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem, provided that no contrary intention is expressed in the mortgage deeds or one of them. But the Act only applies where the mortgages are or one of them is made after the above-mentioned date (e).

(a) *Selby v. Pomfret*, 1 J. & H. 329; 10 Jur. 328.
336; 3 De G. F. & J. 595.

(b) *Exp. Hotchkin*, 20 Eq. 746.

(c) *Jones v. Smith*, 2 Ves. jr. 376;
Higgins v. Frankis, 15 L. J. Ch.

(d) *Cummins v. Fletcher*, 14 Ch. D. 699.

(e) 44 & 45 Vict. c. 41, s. 17.

Cases in which consolidation may not take place.

SECTION III.—EQUITABLE MORTGAGES.

I. *By Agreement.*II. *By Deposit of Title Deeds.*

Russel v. Russel.

III. *Remedies.*Classifica-
tion.

There are two species of equitable mortgages, which, though in many respects similar, are sufficiently distinct to require separate consideration.

The first class comprises those transactions viewed and treated in equity as mortgages, in which a person by agreement or mandate creates a charge upon his property.

The second and more peculiar class comprises equitable mortgages arising from the deposit of title deeds.

I. *Equitable Mortgages by Agreement or Mandate.*Informal
agree-
ments for
mortgages.

1. Any agreement in writing, however informal, by which any property, real or personal, is to be a security for a sum of money, is a charge, and amounts to an equitable mortgage. Thus an agreement that a creditor shall hold land at a fair rent to be retained in satisfaction of the debt, is in the nature of a mortgage, and will be supported as such (*e*).

On the principle that what is agreed to be done is considered in equity as done, an express written agreement to effect a mortgage is treated as a mortgage (*f*). So a written instrument promising to pay a sum of money with interest "out of the estate of the deceased W. H.," and signed by all the persons interested in his estate has been held (the personalty being exhausted)

(*e*) *Morony v. O'Dea*, 1 Ba. & Be.
109; *Coote*, 305.

(*f*) *Hankey v. Vernon*, 2 Cox, 12,
14.

to amount to an equitable mortgage of the real estate (*g*). And an agreement by a married woman to charge her expectancy under the will, or as one of the next of kin of a living person, was on similar grounds enforced after that person's death (*h*). A covenant also that, if payment of a certain debt be not made, the creditor may by entry, foreclosure, sale, or mortgage, levy the amount from the lands of the debtor, is an equitable mortgage (*i*).

2. Another species of equitable mortgage is seen in mortgages of the equity of redemption of an estate which has been already legally mortgaged. But it is not necessary to enter into a separate discussion of such equitable mortgages, inasmuch as any particulars in which they differ from legal mortgages are fully explained under the heads of Notice and Tacking (*k*).

Mortgages of an equity of redemption.

II. *Equitable Mortgages by Deposit of Title Deeds.*

It is a well-known provision of the Statute of Frauds (*l*) that no action shall be brought upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, be in writing and signed by the party to be charged therewith, or his duly authorised agent (*m*).

Statute of Frauds.

In the case of

RUSSEL v. RUSSEL

[1 Bro. C. C. 269 ; 1 W. & T. L. C. 726]

Russel v. Russel.

this was relied on as an answer to an action which sought to establish a charge on the mere fact of the deposit of a deed. But the objection did not avail ; and it has long

(*g*) *Suart v. Toulmine*, 2 Pow. Mtg. 1049 a, ed. 6.

(*h*) *Flower v. Buller*, 15 Ch. D. 665. But see also *Pike v. Fitzgibbon*, 14 Ch. D. 837 ; 17 Ch. D. 454.

(*i*) *Eyre v. McDowell*, 9 H. L. 620.

(*k*) See pp. 245 *et seq.*, 278 *et seq.*

(*l*) 29 Car. II. c. 3.

(*m*) s. 4.

Deposit
sufficient
evidence of
an agree-
ment.

been established that if the title deeds of an estate are, without even verbal communication, deposited by a debtor in the hands of his creditor, such deposit is of itself evidence of an agreement executed for a mortgage of the estate; and the creditor may avail himself of it as of an agreement in writing for that purpose, and may bring an action for the completion of his security by a legal conveyance (*n*). These bold decisions have given rise to transactions which now form a conspicuous feature in equitable jurisprudence, and which require attentive consideration.

(1.) *What constitutes such a mortgage.*

What
deposits
sufficient.

(i.) It has already been stated that a deposit of title deeds, unaccompanied by any verbal agreement, is evidence of an agreement for a mortgage which may be enforced; and this proposition may be abundantly illustrated. Thus a deposit of a copy of Court rolls (*o*), of an agreement for a lease (*p*), of a policy of insurance (*q*), of a registered mortgage of a ship (*r*), or of a certificate of shares in a public company (*s*), may constitute an equitable mortgage.

Deposit of
part of
deeds.

(ii.) An equitable mortgage may be created by a deposit of part of the title deeds only, and it is not necessary that the deeds deposited should show a good title in the depositor (*t*). But a deposit of deeds relating to part of an estate, with a representation that they relate to the whole, will only effect a mortgage of the part actually comprised in the deeds (*u*). If the deeds are deposited, some with one creditor, some with another, each may have a valid charge (*x*). Moreover, if there are no title deeds or conveyances in the depositor's

Of receipt
for pur-

(*n*) *Exp. Wright*, 19 Ves. 258.

(*o*) *Exp. Warner*, 1 Rose, 286.

(*p*) *Unity &c. Co. v. King*, 25 Beav. 72.

(*q*) *Ferris v. Mullins*, 2 Sm. & G. 378.

(*r*) *Lacon v. Liffen*, 4 Giff. 75.

(*s*) *Exp. Moss*, 3 De G. & Sm. 599.

(*t*) *Exp. Wetherall*, 11 Ves. 398; *Roberts v. Croft*, 24 Beav. 223; 2 De G. & J. 1.

(*u*) *Jones v. Williams*, 24 Beav. 47.

(*x*) *Roberts v. Croft*, *sup.*

possession, an equitable mortgage may be created by the deposit of the receipt for purchase-money, containing the terms of the agreement for sale (*y*). chase-money.

(iii.) Where land had to be registered under the Land Registry Act (*z*), an equitable mortgage might be created by a deposit of the land certificate (*a*), but not by that of the title deeds (*b*). The same provision is continued under the Land Transfer Act (*c*). Registered lands.

(iv.) A deposit of the deeds with a third person for the benefit of the creditor will be sufficient to create a security; and the possession of the agent of the debtor may suffice, if there is a memorandum of deposit showing an intention to make him a trustee (*d*). But a deposit with the wife of the debtor, to be kept by her for the creditor, was held insufficient (*e*); and where the deeds remain in the hands of the debtor, accompanied by a memorandum of deposit, there is no valid mortgage (*f*) unless indeed the debtor in fact holds them as the servant of the creditor (*g*). Deposit with third person.

(v.) But though a deposit of title deeds or their equivalent is evidence of an agreement for a mortgage which may suffice to establish a claim for relief in equity, it does not itself constitute an agreement. The depositor may show that the deposit was not made with the view and intent to effect a security, but with some other intent or for some other purpose. The mere possession of the title deeds is, therefore, not enough to create an equitable security (*h*). For instance, deeds may be deposited merely for the purpose of safe custody; or on some definite condition (*i*); or there may be attendant circumstances showing that there was no intention to create a mortgage, as, for instance, where deeds have been left with a banker after he has Depositor may show that there was no agreement, and that the purpose was not to effect a security.

(*y*) *Goodwin v. Waghorn*, 4 L. J. N. S. Ch. 172.

(*z*) 25 & 26 Vict. c. 53.

(*a*) s. 73.

(*b*) s. 63.

(*c*) 38 & 39 Vict. c. 87, s. 81.

(*d*) *Lloyd v. Atwood*, 3 De G. &

J. 614, 619.

(*e*) *Exp. Coming*, 9 Ves. 115.

(*f*) *Adams v. Claxton*, 6 Ves. 226, 230.

(*g*) *Ferris v. Mullins*, *sup.*

(*h*) *Chapman v. C.*, 13 Beav. 308.

(*i*) *Burton v. Gray*, 8 Ch. 932.

refused to advance money on them (*k*); or the deposit may be accompanied by a memorandum showing that there was not an intention to create a security (*l*). In none of these cases will an equitable mortgage be created; but where the possession of the deeds cannot be accounted for save on the supposition that a mortgage was intended, it amounts to a presumption of such intention so strong that it may be acted upon (*m*).

Deposit
for purpose
of creating
a legal
mortgage.

(vi.) Where deeds are deposited for the purpose of preparing a legal mortgage, a presumption arises of an intention to create an equitable mortgage. At one time it was sought to distinguish between the case where the intention was to secure an antecedent debt, and where it was with a view to secure only a future advance, it having been held that in the latter case no equitable mortgage arose from the deposit (*n*). But it seems that this distinction cannot be sustained, and that now in all cases an equitable mortgage will result from the deposit (*o*). This will clearly be the case if an agreement to give a mortgage accompanies the deposit (*p*).

Written
memoran-
dum suffi-
cient with-
out deposit.

(vii.) A valid equitable mortgage may, as we have seen, be created by a written agreement apart from any deposit; and a written memorandum of deposit is a sufficient agreement (*q*), especially if the deeds be already in the possession of a third party (*r*). But in no case can a mere oral agreement without an actual deposit create an equitable security (*s*).

(2.) *The effects of an equitable mortgage by deposit.*

i. As to the property affected.

What pro-

Prima facie, the deposit of deeds by a debtor constitutes

(*k*) *Lucas v. Dorrien*, 7 Taunt. 278.

(*l*) *Shaw v. Foster*, 5 L. R. H. L. 340; *Spoile v. Whayman*, 20 Beav. 607.

(*m*) *Featherstone v. Fenwick, Harford v. Carpenter*, 1 Bro. C. C. 270, n; *Dixon v. Muckleston*, 8 Ch. 155.

(*n*) *Norris v. Wilkinson*, 12 Ves. 192.

(*o*) *Edge v. Worthington*, 1 Cox, 211; *Exp. Bruce*, 1 Rose, 374.

(*p*) *Hockley v. Bantock*, 1 Russ. 141; *Keys v. Williams*, 3 Y. & C. Ex. 55.

(*q*) *Exp. Orrett*, 3 Mont. & A. 153.

(*r*) *Daw v. Terrel*, 33 Beav. 218.

(*s*) *Exp. Coombe*, 4 Madd. 349.

a mortgage of all the property comprised in them (*t*). But the security may be limited by a written memorandum to that effect (*u*). If, on the contrary, the memorandum refers to deeds which are not deposited, it does not effect a mortgage of the property comprised in them (*x*). Thus the memorandum may limit but may not extend the effect of the deposit, unless, of course, the memorandum is in such a form as in itself to constitute an equitable mortgage.

perty is deemed to be mortgaged.
 Memorandum may limit the effect of the deposit.

A deposit of title deeds will comprehend any interest which the depositor may afterwards acquire in the property (*y*), and will include not only fixtures existing at the time, but also those subsequently erected thereon, whether the fixtures are mentioned or not (*z*). And the result is the same whether the deposit is made by the owner in fee who is also owner of the fixtures, or by a lessee who is owner of the fixtures, although as between landlord and tenant they are removable (*a*). On the bankruptcy of the depositor of a lease, the fixtures will not be considered as being in his order and disposition, but will belong to the mortgagee (*b*); but a doubtful distinction has been drawn in the case of the deposit of an assignment of a lease, no mention being made of fixtures (*c*). The same case also intimated that such a mortgage, in order to pass the fixtures, would require registration under the Bills of Sale Act, 1854 (*d*), but see *Meux v. Jacobs* (*e*). Registration will, under the Act of 1878 (*f*), be clearly necessary (*g*).

After acquired property.
 Fixtures, in bankruptcy.

A deposit of title deeds can only affect the interest of the depositor. Thus if the deposit be by a trustee, and there is no consent or acquiescence of the *cestui que trust*, Interest of depositor only affected.

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|--|---|
| <p>(<i>t</i>) <i>Ashton v. Dalton</i>, 2 Coll. 566.
 (<i>u</i>) <i>Exp. Glyn</i>, 1 M. D. & De G.
 29.
 (<i>x</i>) <i>Exp. Powell</i>, 6 Jur. 490.
 (<i>y</i>) <i>Pryce v. Bury</i>, 16 Eq. 153.
 (<i>z</i>) <i>Exp. Price</i>, 2 M. D. & De G.
 518; <i>Exp. Astbury</i>, 4 Ch. † 30.
 (<i>a</i>) <i>Exp. Loyd</i>, 3 D. & C. 765;
 <i>Longbottom v. Berry</i>, 5 L. R. Q. B.</p> | <p>123; <i>Meux v. Jacobs</i>, 7 L. R. H. L.
 481.
 (<i>b</i>) <i>Exp. Barclay</i>, 5 De G. M. &
 G. 403.
 (<i>c</i>) <i>In re Trethowan</i>, 5 Ch. D. 559.
 (<i>d</i>) 17 & 18 Vict. c. 36.
 (<i>e</i>) <i>Sup.</i>
 (<i>f</i>) 41 & 42 Vict. c. 31.
 (<i>g</i>) ss. 4, 5; <i>sup.</i> p. 233.</p> |
|--|---|

the security extends only to any beneficial interest which the trustee may have (*h*); and a deposit by a tenant for life cannot affect the interest of remainder-men (*i*).

ii. What debts it may secure.

Prima facie only debts advanced at time of deposit secured. Circumstances or evidence may extend this.

It is a matter of evidence what debts are to be deemed to be comprised in the security of an equitable mortgage. *Prima facie* only the sum advanced at the time of the deposit is considered to be secured thereby (*k*); but the circumstances of the case may suffice to show an intention to secure antecedent advances, and if so it will be carried into effect (*l*); and either written or parol evidence of intention may suffice to extend the security to subsequent advances (*m*); and generally a verbal agreement to make a subsequent advance, on a deposit of deeds already made for another purpose, is sufficient to constitute an equitable mortgage as to the subsequent advance (*n*).

Interest.

A debt secured by an equitable mortgage, although originating in a simple contract, bears interest from the date of the deposit, even without an express agreement to that effect (*o*).

iii. Against whom the security prevails.

Security valid against the Crown.

A deposit of title deeds creates a security valid as against the Crown, if made before the depositor became a Crown debtor by record or specialty (*p*).

Trustee in bankruptcy.

The security is also good against the debtor's trustee in bankruptcy, unless being made so near the bankruptcy as to amount to a fraudulent preference (*q*).

Judgment creditor.

It also prevails against the interest of a subsequent judgment creditor, although he may have acquired legal seisin under an *elegit* and without notice (*r*).

Prior volunteers.

An equitable mortgagee being a purchaser for value, his

(*h*) *Manningford v. Toleman*, 1 Coll. 670; *Exp. Smith*, 2 M. D. & De G. 587.

(*i*) *Turner v. Letts*, 20 Beav. 185.

(*k*) *Exp. Martin*, 4 D. & C. 457; 2 M. & A. 243.

(*l*) *Exp. Farley*, 1 M. D. & De G. 683, 689.

(*m*) *Exp. Langston*, 17 Ves. 230;

Shepherd v. Titley, 2 Atk. 348.

(*n*) *Exp. Kensington*, 2 V. & B. 79; *Exp. Whitbread*, 19 Ves. 209.

(*o*) *Re Kerr's Policy*, 8 Eq. 331.

(*p*) *Casberd v. Ward*, 6 Pri. 411.

(*q*) *Exp. Ainsworth*, 3 M. & A. 457.

(*r*) *Whitworth v. Gaugain*, 3 Ha. 416, 1 Ph. 728.

charge will, by 27 Eliz. c. 4, be effectual against a prior voluntary settlement (s).

But he is liable to all prior equities affecting the depositor; for instance, as we have seen, a deposit of title deeds given in breach of trust, though without notice, does not affect the claim of the beneficiaries; and where a mortgage was obtained without consideration, and then transferred with notice to a person who deposited it to secure a debt, it was held that the deposittee could not be in a better situation than the depositor, and his security was therefore useless (t).

iv. Generally.

The benefit of an equitable mortgage by deposit may be subsequently extended to persons who were not originally deposittees. If a deposit of deeds is made to a firm, the general supposition is that it is not intended to enure for the benefit of future members of that firm; but if an intention that it should so operate is expressed on the memorandum of deposit, or is proved by parol evidence, or is evidenced by continued dealings with the new firm, the new firm may gain the benefit of the security (u). The special features of the liens of bankers, &c., are stated elsewhere (x).

The rules as to priority, as between equitable mortgagees and others, are fully discussed under the headings of notice, and tacking of mortgages (y).

It was formerly supposed that a *cestui que trust* or depository of a lease was liable for the rent and covenants in a suit by the lessor; but the contrary is now clearly established; and the landlord cannot compel him to take or the mortgagor to execute an assignment so as to bring him within the liability of the covenants, even if he has been in possession and paid rent (z).

(s) *Ede v. Knowles*, 2 Y. & C. Ch. 172.

(t) *Parker v. Clarke*, 30 Beav. 54.

(u) *Exp. Kensington*, 2 V. & B. 79, 83; *Exp. Oakes*, 2 M. D. & De G. 234.

(x) p. 266.

(y) See pp. 245 *et seq.*, 278 *et seq.*

(z) *Moore v. Choat*, 8 Sim. 508; *Moore v. Grey*, 2 De G. & Sm. 304; 2 Ph. 717.

Subject to prior equities.

Benefit may be subsequently extended.

Equitable mortgagee of lease not liable to covenants

III. Remedies of an Equitable Mortgagee.

Fore-
closure the
proper
remedy.

(1.) It has been much discussed whether the proper remedy of an equitable mortgagee is foreclosure (after the analogy of a legal mortgage) or sale (after the analogy of a charge). It is now settled that in the case of a mortgage of lands the proper remedy is foreclosure (*a*), whether the mortgage arises from an agreement for a legal mortgage (*b*), or from a deposit of title deeds with or without a written memorandum (*c*), or is a mortgage of an equity of redemption (*d*). If there is a deposit of title deeds, accompanied by a written agreement for a mortgage, the mortgagee is entitled to either sale or foreclosure (*e*).

The
remedy is
sale in case
of a charge
or pledge
of chattels.
Receiver.

Where there is a mere charge or lien, the remedy is sale, and not foreclosure (*f*); sale is also the proper remedy in the case of a pledge of personal chattels (*g*).

An equitable mortgagee is entitled to a receiver, and one may be appointed on motion before defence, and even before appearance in cases where a risk of loss is shown (*h*).

Under
Bank-
ruptcy
Act.

(2.) The remedies of mortgagees (including equitable mortgagees) in bankruptcy, and also in the administration of insolvent estates, and in the winding-up of companies, are now regulated by s. 40 of the Bankruptcy Act, 1869 (*i*). The general principle is that the mortgagee may either give up his security and prove for his whole debt, or retain his security and prove for whatever deficiency there may be. The jurisdiction of Chancery is, however, not taken away by the Bankruptcy Act, so that the mortgagee may still proceed in Chancery against the trustee in bankruptcy for the realisation of his security (*k*).

(a) *Pryce v. Bury*, 2 Drew 41; 18 Jur. 967; *James v. J.*, 16 Eq. 153.

(b) *Frail v. Ellis*, 16 Beav. 350.

(c) *Carter v. Wake*, 4 Ch. D. 605, 606, per M. R.; *Backhouse v. Charlton*, 8 Ch. D. 444.

(d) *Richards v. Cooper*, 5 Beav. 304.

(e) *York &c. Co. v. Artley*, 11 Ch. D. 205.

(f) *Tennant v. Trenchard*, 4 Ch. 537.

(g) *Carter v. Wake*, *sup.*

(h) *Aberdeen v. Chitty*, 3 Y. & C. Ex. 379; *Meaden v. Sealey*, 6 Ha. 620.

(i) 32 & 33 Vict. c. 71; Jud. Act, 1875, 38 & 39 Vict. c. 77, s. 10.

(k) *White v. Simmons*, 6 Ch. 555.

SECTION IV.—LIENS.

Generally.

I. *Liens at Law.*

II. *Equitable Liens.*

1. *Charges.*

2. *Vendor's Lien.*

Mackreth v. Symmons.

3. *Vendee's Lien.*

Analogous in many respects to mortgages are those charges of various kinds which are designated by the general term "liens." A lien is not, however, like a mortgage, a *jus in re*, or a *jus ad rem*, but is simply a right to possess and retain the property subject thereto, until some charge attaching to it is paid or discharged (*l*). Definition.

Liens are either legal or equitable; that is to say, some liens have always been recognised by the common law; others, apart from recent legislation, could be enforced only in Courts of Equity. Liens legal or equitable.

I. Of liens recognised at law some are specific, others general. It will not be necessary here to do more than briefly indicate some examples of such liens. Familiar illustrations of specific liens are, the right which an artisan has to retain an article delivered to him to work on until he is paid for the labour expended thereon (*m*), the lien of an accountant upon books entrusted to him for examination and arrangement (*n*), the lien of a ship-owner who has paid a sum for salvage, upon the goods on board for the amount Specific liens. Artisan. Accountant. Ship-owner.

(*l*) Story, 506.

(*n*) *Exp. Southall*, 17 L. J. Bk.

(*m*) *Scarfe v. Morgan*, 4 M. & W. 21.
270.

Partner. of contribution to which the owner of the goods is liable (*o*), and the lien of a partner on the partnership property for what may be found due to him on taking the partnership account (*p*).

General liens,

when maintainable. A general lien differs from one that is specific in that it entitles the creditor to retain the property in question as a security, not merely for a particular charge, but for the general balance due to him. It has been held that a general lien can only be maintained in particular trades where its existence has been judicially declared (*q*). Lord Mansfield stated that a general lien would be upheld in four cases: (1) where it is an express contract; (2) where it is implied from the usage of trade; (3) where it is implied from the manner of dealing between the parties on the particular case; (4) where the party has acted as a factor (*r*).

Liens by usage : Bankers. An important instance of a lien by usage is the lien of a banker over all the bills, papers, and securities of a customer in his hands, which right subsists unless there be an express contract or circumstances showing an implied contract inconsistent with the lien (*s*). An instance of a circumstance showing such an implied contract is the case of a lease being accidentally left with the banker after he had refused to lend money upon it (*t*).

Brokers. Inn-keepers. A broker has a similar lien (*u*), and an innkeeper has a general lien on articles belonging to his guests, which come into his possession as innkeeper (*x*).

Factors. A factor has a general lien on goods consigned to him for sale, and on the purchase-money thereof (*y*), as well as a specific lien on goods bought for the purchase-money and freight paid in respect thereof (*z*). A wharfinger has also

Wharfingers.

(*o*) *Briggs v. Merchant &c. Assoc.*, 18 L. J. Q. B. 178.

(*p*) *Skip v. Harwood*, 2 Swanst. 586.

(*q*) *Bock v. Gopisson*, 6 Jur. N. S. 547; 7 *ib.* 81.

(*r*) *Green v. Farmer*, 4 Burr. 2221.

(*s*) *Davies v. Bowsher*, 5 T. R. 488; *London Chartered Bank v. White*, 4 App. C. 113.

(*t*) *Lucas v. Dorrien*, 7 Taunt. 278.

(*u*) *Hewison v. Guthrie*, 2 Bing. N. C. 755.

(*x*) *Threfall v. Borrick*, 7 L. R. Q. B. 711; 10 *ib.* 210.

(*y*) *Godin v. London Ass. Co.*, 1 Bur. 490; *Robson v. Kemp*, 4 Esp. 236.

(*z*) *Exp. Emery*, 2 Ves. sr. 674; *Exp. Good*, 3 M. & A. 246.

the same general lien as a factor for the balance of his wharfage dues and freight (*a*).

The lien of a solicitor is of such a nature as to require especial consideration. A solicitor has a general lien on the papers of his client in his hands for his costs, charges, and expenses (*b*); and in consequence thereof every client is entitled to have his costs taxed, though there may be no item in the account relating to an action at law or in equity (*c*). This lien is merely a right to retain, and cannot be actively enforced (*d*). It appears not to be waived by an order for payment, or by an attachment for non-payment of costs, nor by any proceeding against the person of the debtor (*e*). It is not confined to deeds and papers, but extends to other articles delivered to the solicitor for the purposes of the action; for instance, to books, shares in a company, &c. (*f*).

A solicitor has also a specific lien on the fund recovered by him in an action for the costs of the action (*g*), and similarly, also, upon money of the client in his hands to abide the result of the action (*h*). The lien is limited to the interest in the fund of the party who retained the solicitor (*i*), and is subject to any equity between the parties, so that if there is a set-off of costs of suit payable by the defendant against the sum found due from the plaintiff, the lien of the defendant's solicitor only extends to the amount of the ultimate balance due from the plaintiff (*k*). The lien upon a judgment is merely a claim to the equitable interference of the Court to have the judgment held as a security for the costs. It is not equivalent to an equitable assignment or charge on the judgment, nor does it constitute the client a trustee for the solicitor so as to prevent a set-off by a

(*a*) *Naylor v. Mangles*, 1 Esp. 109; 25 & 26 Vict. c. 63, s. 76.

(*b*) *Stevenson v. Blakelock*, 1 M. & S. 535.

(*c*) *Re Barker*, 6 Sim. 476.

(*d*) *Bozon v. Bollond*, 4 My. & C. 357.

(*e*) *Lloyd v. Mason*, 4 Ha. 132; *Exp. Bryant*, 1 Mad. 49.

(*f*) *Friswell v. King*, 15 Sim. 191; *General Share Trust Co. v. Chapman*, 1 C. P. D. 771.

(*g*) *Bozon v. Bollond*, *sup.*

(*h*) *Hanson v. Reece*, 3 Jur. N. S. 1204.

(*i*) *Hall v. Laver*, 1 Ha. 571.

(*k*) *Bartree v. Watson*, 2 Keen, 713.

defendant of another judgment against the client (*l*). But see also *Exp. Cleland* (*m*).

Solicitor for trustee The solicitor of a trustee has no lien upon the trust fund for the general costs of the trust, though the trustee upon paying those costs might take them out of the fund (*n*).
and executor. The solicitor for an executor, however, has a lien on the deeds of the estate if the executor or his estate is not indebted to the estate of the testator (*o*).

Lien against real estate, 23 & 24 Vict. c. 127. Previous to 23 & 24 Vict. c. 127, a solicitor had no lien for his costs against real estate either at law or in equity. By s. 28 of that Act it is enacted that it shall be lawful for the Court or judge, before whom any suit or matter has been heard, to declare that the solicitor employed therein is entitled to a charge upon the property recovered or preserved by his instrumentality in such suit or matter; and that all conveyances and acts done to defeat such charge shall, unless made to a *bonâ fide* purchaser without notice, be absolutely void and of no effect as against such charge or right. This Act applies to property of all kinds (*p*), and a liberal construction is placed upon the word "preserved." The appointment of a receiver of the real estate of an infant has been held to bring the property within the section (*q*).

Securities inconsistent with the lien. A solicitor who takes a security is considered to have abandoned his lien (*r*), but for this purpose a charging order under the Act is not deemed a security so as to interfere with the lien which he enjoys apart from the Act (*s*).

II. *Equitable Liens.*

Charges. 1. The most conspicuous and important among equitable liens are those arising from charges of legacies and portions

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|---|---|
| (<i>l</i>) <i>Barker v. St. Quentin</i> , 12 M. & W. 451; <i>Mercer v. Graves</i> , 7 L. R. Q. B. 499, 505-6. | (<i>p</i>) <i>Birchall v. Pugin</i> , 10 L. R. C. P. 399. |
| (<i>m</i>) 2 Ch. 813. | (<i>q</i>) <i>Baile v. B.</i> , 13 Eq. 497. |
| (<i>n</i>) <i>Hall v. Laver</i> , 1 Ha. 571. | (<i>r</i>) <i>Balsh v. Symes</i> , T. & R. 92. |
| (<i>o</i>) <i>Turner v. Letts</i> , 7 De G. M. & G. 243. | (<i>s</i>) <i>De Bay v. Griffin</i> , 10 Ch. 294 n. |

upon real estate. Such liens create a trust which equity will enforce against the person creating the lien, and persons claiming as volunteers or with notice under him. The effect of such charges is more fully considered elsewhere (t).

2. The lien of a vendor for unpaid purchase-money and that of a vendee for prematurely paid purchase-money are also characteristic instances of equitable liens, and therefore require detailed investigation. Lien of vendor.

In discussing the application of the well-known equitable principle known as the vendor's lien, it is necessary to distinguish between its operation as between the vendor and purchaser, and as between the vendor and third persons claiming through or under the purchaser. As, however, persons claiming under the purchaser as volunteers are in the same position as himself, the most convenient distribution of the subject is to include volunteers in the first inquiry, and then to consider the extent of the vendor's lien as against those whose title is derived from the purchaser for valuable consideration.

(1.) *Vendor's lien against a purchaser, his heirs, and voluntary assignees.*

The general principle as to the lien of the vendor of an estate is fully expressed in the judgment of Lord Eldon in General principle.

MACKRETH v. SYMMONS,

[15 Ves. 329 ; 1 W. & T. L. C. 324,]

which is to the following effect : Where a vendor, in compliance with a contract for the sale of an estate, executes a conveyance thereof, but the purchase-money is wholly or partially unpaid, then, notwithstanding that on the face of the conveyance it is expressed to be paid, or that a receipt for it is endorsed thereon, the vendor has a lien on the estate for the money remaining due to him

The same case further shows that the mere circumstance of taking an additional security is not inconsistent with

(t) pp. 298, *et seq.*, 497—9.

the continuance of the lien. The circumstances which are considered to amount to a waiver or abandonment of the lien are hereafter separately discussed. It suffices now to say that the taking of a bond, or bill, or promissory note, is not of itself evidence of an intention to waive the lien (*u*).

Applies to copyholds and leaseholds,

not to personal chattels,

The lien applies to copyholds and leaseholds as well as to freeholds (*x*), and attaches when possession of the estate has been delivered to the purchaser, though there has been no conveyance to him (*y*). It does not, however, apply to personal property other than chattels real. As soon as a purchaser has possession (actual or constructive) of such property, the lien is gone (*z*). The question of stoppage *in transitu* depends on a different principle, not relevant to the present inquiry.

when consideration is an annuity.

Lien doubtful where there is other security.

Where the consideration for the sale of an estate is in the form of an annuity, the lien attaches to secure the annuity, at least if no other security for that purpose is taken. Where the annuity has been secured by a bond or covenant, the cases have been somewhat conflicting. In the principal case, Lord Eldon held that there was no lien for the annuities; but he did so rather in consideration of the special circumstances of the case, than as a general principle of law. In *Tardiffe v. Scrugghan* (*a*) the lien was allowed, and this case has never been overruled, though in somewhat similar circumstances some judges have been slow to follow it (*b*). See also in favour of the lien *Matthew v. Bowler* (*c*), Sugden V. & P. 676, ed. 14.

Lien extends to moneys advanced.

If a vendor agrees to lend money to the purchaser for improving the estate, his lien extends to the advances so made, as well as to the purchase (*d*).

Special consideration is required of those cases in which

(*u*) *Collins v. C.*, 31 Beav. 346;

Hughes v. Kearney, 1 S. & L. 134.

(*x*) *Winter v. Anson*, 3 Russ. 492;

Matthew v. Bowler, 6 Ha. 110.

(*y*) *Smith v. Hibbard*, 2 Dick 730.

(*z*) 15 Ves. 344; *Exp. Gwynne*, 12 Ves. 383.

(*a*) 1 Bro. C. C. 423.

(*b*) *Clarke v. Boyle*, 3 Sim. 502; *Buckland v. Pocknell*, 13 Sim. 412.

(*c*) *Sup.*

(*d*) *Exp. Linden*, 1 M. D. & De G. 435.

a vendor asserts his lien with respect to a sale to a railway or other company.

As a general rule, the lien attaches to lands purchased by such companies, whether by agreement or in the exercise of compulsory powers (*e*); and it includes unpaid compensation as well as purchase-money, unless such compensation is the subject of a separate agreement. Although a railway may have been made over the land, the lien may be enforced by sale (*f*); but not by an injunction restraining the use of the railway (*g*).

Where, however, the consideration for the purchase is a rent-charge on the lands, there is no lien for securing its payment (*h*), but the owner of the rent-charge is entitled to a receiver of the tolls and net earnings of the undertaking, and may distrain on the lands (*i*).

A vendor's lien is so far regarded as an interest in land as to be within the Mortmain Act (*k*), and a bequest of money due thereupon is therefore void (*l*); and it seems that a mere parol assignment of it would be ineffectual, as within the Statute of Frauds, unless accompanied by a deposit of title deeds (*m*). The lien, however, is not such an interest in land as to come within sect. 23 of the Wills' Act (*n*). So, if, after devising an estate, the devisor contracts to sell it, the purchase-money will belong to the personal representatives and not to the devisee (*o*).

A vendor's lien not being an express trust, the right to enforce it may be barred by the Statute of Limitations at the end of twelve years (*p*), unless the case is taken out of the operation of the statute by a sufficient acknowledgment (*q*).

(*e*) *Walker v. Ware &c. Co.*, 1 Eq. 195.

(*f*) *Cosens v. Bognor &c. Co.*, 1 Ch. 594; *Munns v. I. of Wight R. Co.*, 5 Ch. 414.

(*g*) *Pell v. Northampton &c. R. Co.*, 2 Ch. 100.

(*h*) *E. of Jersey v. Briton &c. Dock Co.*, 7 Eq. 409.

(*i*) *Eyton v. Denbigh &c. Co.*, 6 Eq. 14.

(*k*) 9 Geo. II. c. 36.

(*l*) *Harrison v. H.*, 1 R. & M. 71.

(*m*) *Dryden v. Frost*, 3 My. & Cr. 670; *Meux v. Smith*, 11 Sim. 421.

(*n*) 1 Vict. c. 26.

(*o*) *Farrar v. E. of Winterton*, 5 Beav. 1. But see *Drant v. Vause*, 1 Y. & C. Ch. 580.

(*p*) 3 & 4 Will. IV. c. 27; 37 & 38 Vict. c. 57.

(*q*) *Toft v. Stephenson*, 1 De G. M. & G. 28; 5 *ib.* 735.

Lien as against railway and other companies generally.

Where the consideration is a rent-charge.

Lien within the Mortmain Act,

and Statute of Frauds,

but not an interest in land within Wills Act.

Lien barred by Statute of Limitations.

Not within
17 & 18
Vict. c.
113,
but in-
cluded in
amending
Acts.

A vendor's lien was held not to be a mortgage within Locke King's Act (r), so that the personal estate of a deceased purchaser was primarily liable for the payment of the purchase-money (s); but, by 30 & 31 Vict. c. 69, the word "mortgage" was declared to include any lien for unpaid purchase-money upon any lands purchased by a testator; and by 40 & 41 Vict. c. 34, the same construction was applied in case the purchaser died intestate.

(2.) *Vendor's lien as against purchasers for value.*

Whom the
lien binds.

The equitable lien for unpaid purchase-money binds the estate, as well in the hands of persons claiming for valuable consideration under the purchaser *with notice*, as in the hands of the purchaser himself, his heirs, and voluntary assignees (t); but the lien will not prevail against a *bonâ fide* purchaser who buys without notice that the purchase-money remains unpaid, and acquires the legal estate (u). If, however, the legal estate is outstanding, then, as the second purchaser has only an equitable interest subsequent in time to the equitable lien, the equitable lien will have precedence, conformably to the maxim "*Qui prior est tempore potior est jure*" (x). But this again is subject to modification, since priority in time will not avail unless the equities are equal. If, therefore, the vendor has been guilty of negligence, he may lose his lien. Thus in *Rice v. Rice* (y), certain leaseholds were assigned to a purchaser by a deed which recited the payment of the whole of the purchase-money, and had the usual receipt endorsed on it; the title deeds were delivered up to the purchaser, but the whole of the purchase-money was, in fact, not paid. The purchaser forthwith deposited the assignment and title deeds to secure an advance. It was held that the equity arising from the deposit ought to prevail against the lien, on the ground that the vendor had, by his negligence,

Lien may
be lost by
negligence.

(r) 17 & 18 Vict. c. 113.

(s) *Hood v. H.*, 3 Jur. N. S. 684.

(t) *Walker v. Preswick*, 2 Ves. 622; *Winter v. Anson*, 3 Russ. 488; 1 S. & S. 431.

(u) *Cator v. E. of Pembroke*, 1 Bro. C. C. 302.

(x) *Frere v. Moore*, 8 Pri. 475.

(y) 2 Drew, 73.

placed it in the power of the purchaser to deal with the estate as absolute owner at law and in equity.

The results are :—

i. That the lien prevails against a second purchaser with notice, even though he acquires the legal estate ; and as against a purchaser without notice, if the legal estate is outstanding, and the vendor has not been guilty of negligence.

ii. That the lien does not prevail against a *bonâ fide* purchaser who acquires the legal estate without notice ; nor against a purchaser of an equitable interest, where the first vendor has been guilty of negligence. Or perhaps it may be said still more generally that the lien will not prevail against a subsequent equitable mortgagee who strengthens his equity by acquiring possession of the title deeds.

The force of the lien being thus in a great measure dependent upon the question of notice, we may here add some illustrations, especially touching this class of cases, of what does and does not constitute notice, though this subject is more fully considered elsewhere (z). What amounts to notice.

Where a subsequent purchaser or mortgagee omits to make inquiries for the title deeds of the property in question, or accepts an insufficient excuse for their absence, the Court will impute to him notice of a prior claim, and will enforce it against him, although he may acquire the legal estate (a). Not so, however, if he has made inquiry, and a reasonable excuse has been given for the non-appearance of the deeds (b). Omission to inquire for title deeds.

Where the vendor has acknowledged the receipt of the purchase-money in the body of the deed and by endorsement, the fact of his remaining in possession of the estate as lessee will not amount to notice of the purchase-money remaining unpaid (c). Effect of receipt clause.

(z) See p. 280 *et seq.*

(a) *Worthington v. Morgan*, 16 Sim. 547 ; *Peto v. Hammond*, 30 Beav. 495.

(b) *Allen v. Knight*, 5 Ha. 272 ; *Hewitt v. Loosmore*, 9 Ha. 449.

(c) *White v. Wakefield*, 7 Sim. 401.

Recitals.

A recital showing that the title is deduced from the first vendor, but not showing that the purchase-money has not been paid, is not sufficient to affect a purchaser with notice (*d*).

Trustee in bankruptcy bound.

The trustee in bankruptcy of a purchaser will be affected by the lien of a vendor, though he may have had no notice, since he takes subject to all equities attaching to the bankrupt (*e*).

(3.) *What amounts to waiver or abandonment of the lien.*

Lien not waived by taking a security *ipso facto*.

We have seen that the mere fact of the vendor taking an additional security for his money is not *per se* a waiver of his lien. Lien depends on an implied contract, and the question is, whether from the circumstances of the case the Court will infer that the lien was intended to be reserved, or that the intention was to give credit exclusively to the person from whom the security was taken.

It is a question of intention.

The general rule is that although the mere taking of a bond, bill, promissory note, or covenant for the purchase-money will not destroy the lien, yet where it appears that the bond, note, or covenant was *substituted* for the consideration money, and was in fact the thing bargained for, the lien ceases to exist. In other words, if the consideration for which the estate is sold is the bond, note, or covenant, then on the giving of this security, the vendor gets all that he bargained for, the transaction is complete, and he cannot thereafter assert a lien. It is evident that as a rule the intention of the vendor is not by taking one security to lose another. It requires, therefore, clear evidence to show that a lien was not intended (*f*). An express agreement is, however, not required, and a few illustrations will serve to indicate what acts short of that will be considered sufficient for the purpose.

What amounts to sufficient indication of intention

Where there was a stipulation that payment of the purchase-money should be deferred until a certain time after a resale of the property, the vendor was considered to have abandoned his lien (*g*).

(*d*) *Cator v. E. of Pembroke*, 1 Bro. C. C. 302.

(*e*) *Exp. Hanson*, 12 Ves. 349.

(*f*) 15 Ves. 341; *Frail v. Ellis*, 16 Beav. 350.

(*g*) *Exp. Parkes*, 1 G. & J. 228.

A mortgage of other lands for the whole or part of the purchase-money (*h*), or a mortgage of the purchased estate for part of the purchase-money, permitting the rest to remain on personal security, has been thought sufficient to discharge the lien—in the first instance wholly, in the second to the extent of the money remaining on the personal security (*i*). The former of these cases was, however, not considered conclusive by Lord Eldon in *Mackreth v. Symmons* (*k*), and it would seemingly be necessary to look further at the whole circumstances of the case (*l*).

If a vendor, knowing the purchase-money to be trust money, suffers one of the trustees to retain part of it without the knowledge of the co-trustees or the *cestui que trust*, he has no lien for the part so retained (*m*). Where, again, the vendor, without receiving the purchase-money, executes a conveyance for the purpose of enabling the purchaser to execute a mortgage, he will lose his lien as against the mortgagee (*n*). These cases are, however, rather illustrative of the loss of the lien by negligence than of its intentional waiver.

We have already seen that where the consideration for the purchase is an annuity, slighter evidence will suffice to show an intention to abandon the lien than in other cases; if it may not even be said that in these circumstances the presumption is against the lien.

A vendor, herein differing from a mortgagee, cannot proceed to enforce his lien and his collateral securities at the same time (*o*); and he will be postponed to a mortgage of the estate made to secure a part of the purchase-money advanced by such mortgagee, if he is an assenting party to the mortgage (*p*).

(*h*) *Nairne v. Prowse*, 6 Ves. 752.

(*i*) *Bond v. Kent*, 2 Vern. 281;
Capper v. Spottiswoode, Tambl. 21.

(*k*) 15 Ves. 329.

(*l*) *Saunders v. Leslie*, 2 Ba. & Be.
509.

(*m*) *White v. Wakefield*, 7 Sim. 401.

(*n*) *Smith v. Evans*, 28 Beav. 59.

(*o*) *Nairne v. Prowse*, *sup.*; *Barker v. Smart* 3 Beav. 64.

(*p*) *Cood v. Pollard*, 9 Pri. 544;
10 *ib.* 109.

(4.) *Marshalling for lien.*

Marshall-
ling.

The general principles of marshalling are expounded elsewhere (p. 509 *et seq.*), and it is therefore only necessary here to refer to its application in the particular case of a lien.

Lien
thrown
on the
purchased
estate.

Following the rule that if one person has two funds to which he may resort, he shall not disappoint another person who can only resort to one of the funds, the Court will, in the event of the death of the vendee, marshal the assets in favour of third persons, so as in case of necessity to compel the vendor to resort to the purchased estate for his money (*q*). At one time it was thought that to do this would be to invade the Statute of Frauds, but it is now well established that, as well in favour of legatees as of creditors, the principle of marshalling will be applied. Legatees, however, can, of course, in this, as in other cases, demand the benefit of marshalling only against those whose claim is weaker than their own—*e.g.*, against the heir taking by descent—not against devisees, who are as much an object of bounty as themselves (*r*).

against
heir.

3. *Lien of a purchaser for prematurely paid purchase-money.*

Vendee's
lien
generally
analogous.

Quite analogous to the lien of a vendor on the estate for unpaid purchase-money is the lien of the purchaser in case he has paid the purchase-money or any part of it prematurely. If the contract is after such payment rescinded, or cannot be enforced owing to want of title in the vendor, or is for any proper reason disclaimed by the purchaser, he has a lien on the estate in the hands of the vendor for the money so paid, with interest thereon, and for his costs (*s*).

The principles applicable to a vendor's lien are equally so here. Thus the taking of another security for the money is not inconsistent with the lien (*t*); it obtains not only against the vendor, but against a subsequent mortgagee who has notice of the payments having been

(*q*) *Trimmer v. Bayne*, 9 Ves. 209;
Sproule v. Prior, 8 Sim. 189.

(*r*) *Wythe v. Henniker*, 2 My. &
K. 635.

(*s*) *Wythes v. Lee*, 3 Drew, 396;
Torrance v. Bolton, 14 Eq. 124; 8
Ch. 118.

(*t*) *Wythes v. Lee*, *sup.*

made (*u*) ; and there is no lien where the contract goes off through the purchaser's own default (*x*).

If the first purchaser of an estate sells the estate while subject to a lien for prematurely paid purchase-money, and the second purchaser also pays his purchase-money prematurely, and afterwards the first contract goes off, the second purchaser then has a lien upon the first purchaser's interest—that is, a lien upon the sum for which the first purchaser has a lien (*y*).

Sale of land subject to the lien.

If the vendor is a mortgagee selling under a power of sale, the purchaser's lien attaches only upon the interest of the mortgagee, not to the prejudice of the mortgagor (*z*) ; but it may affect the interest of persons for whom the mortgagee is a trustee (*a*).

(*u*) *Rose v. Watson*, 10 H. L. 672.

Wickens, 4 Ch. 101.

(*x*) *Dinn v. Grant*, 5 De G. & Sm. 451.

(*z*) *Wythes v. Lee*, *sup.*

(*y*) *Aberaman Iron Works v.*

(*a*) *Ibid.*

SECTION V.—EQUITABLE PRINCIPLES PARTICULARLY AFFECTING MORTGAGES AND SALES.

I. *Notice.*

1. *Effects of Notice.*
2. *What constitutes Notice.*
 - (1.) *Actual Notice.*
 - (2.) *Constructive Notice.*
3. *Matters analogous to Notice.*

II. *Defence of Purchase for Value without Notice.*

1. *Where Defendant has Legal Estate.*
2. *Where Legal Estate is outstanding.*
3. *Where Plaintiff has Legal Estate.*
4. *Active Relief to bonâ fide Purchaser.*

III. *Liability of Purchasers for Application of Purchase-money.*

1. *As to Personality.*
2. *As to Realty.*
3. *Statutory Modifications.*

IV. *Assignment of Possibilities and Choses in Action.*

1. *Contrast of Law and Equity.*

Warmstrey v. Tanfield.

Row v. Dawson.

2. *Notice.*

Ryall v. Rowles.

3. *Assignee subject to Equities.*

4. *Judicature Act, s. 25, sub-s. 6.*

5. *Unlawful Assignments.*

I. *Notice.*

1. *The effects of notice.*

(1.) A purchaser for value without notice is, as we have seen, in many respects favoured in equity. It is well established that a person who purchases an estate after notice of a prior equitable right makes himself a *malâ fide* purchaser, and will not be able to defeat the

prior right by getting in the legal estate for his protection. On the contrary, he will be held a trustee for the benefit of the person whose right he sought to defeat; and he secures no better position than that of the person who conveys to him.

Perhaps the most frequent illustrations of the principle are afforded by cases in which a person purchases, or takes a legal mortgage of an estate with notice of a prior equitable mortgage by deposit of title deeds (*b*), or of a prior equitable lien for unpaid purchase-money (*c*); and those cases in which a person purchases with notice of a trust (*d*).

(2.) It is established that where registration is required an earlier registration will not suffice to gain priority in the face of notice of the unregistered deed (*e*). But if the second transaction was without notice at its inception, priority may then be gained by a registration made after knowledge of the earlier unregistered, or defectively registered, deed has been acquired (*f*). Registration, moreover, is, under the English Acts, not of itself notice; so that a prior equitable incumbrance will not, though registered, affect a subsequent purchaser without notice who obtains the legal estate (*g*). The Irish Registration Act (*h*) is differently framed, and expressly gives priority to instruments in the order of their registration (*i*). Effect of registration.
Registration not notice.
Secus in Ireland.

(3.) Where a person purchases for valuable consideration, but with notice of a prior charge, from a person who acquired his interest without notice of it, he may protect himself behind the *bona fides* of the first purchaser (*k*). At first sight this seems inconsistent with the principle that personal *mala fides* disentitles to protection; but it is evident that if it were otherwise the first *bonâ fide* Purchase with notice from a person without notice.

(*b*) *Birch v. Ellames*, 2 Anst. 427.

(*c*) *Mackreth v. Symmons*, 15 Ves.

349.

(*d*) *Dunbar v. Tredinnick*, 2 Bull.

& B. 319.

(*e*) *Le Neve v. Le Neve*, Amb. 436.

(*f*) *Elsey v. Lutyens*, 8 Ha. 159;

Essex v. Baugh, 1 Y. & C. Ch. C. 620.

(*g*) *Morcock v. Dickens*, Amb. 678.

(*h*) 6 Anne, c 2.

(*i*) *Bushell v. B.*, 1 S. & L. 98.

(*k*) *Lowther v. Gordon*, 2 Atk. 242.

purchaser would be the sufferer, being so far hindered in the exercise of his innocent right.

Purchase without notice from person who has notice : where the title is legal ; where equitable.

Conversely, if a person who has notice sells to a *bonâ fide* purchaser without notice, and the latter secures the legal title, he is protected against the prior charge (*l*). If, however, a merely equitable interest is dealt with in this case, the result is different, since persons purchasing equitable interests take them subject to all the equities affecting them. Thus the assignor could not give the assignee a better interest than he himself had—namely, an interest subject to the charge of which he had notice (*m*).

Notice effectual if before actual payment or before actual conveyance.

(4.) Notice before actual payment of the purchase-money is sufficient to bind a purchaser, as well as notice previous to his contract, since after such notice he may rescind his contract in equity (*n*). And, conversely, notice before the execution of the conveyance is binding, although the purchase-money may have been paid before notice, since the purchaser may secure himself by retaining the legal estate (*o*).

Notice actual or constructive.

2. What constitutes notice.

Notice is either actual or constructive.

Actual notice.

(1.) Actual notice, or, in other words, express notice, is a term sufficiently clear to need no explanation. It may be either written or oral (except in cases in which a written notice is stipulated for). Vague reports from persons not interested in the property do not, however, amount to notice ; nor do mere general assertions that some other persons claim a title (*p*). In order to be binding upon a purchaser the information must proceed from some person interested in the property (*q*).

Constructive notice.

(2.) Constructive notice is nothing other than evidence of notice so strong that the Court will act upon it in the absence of contradiction (*r*). Such being the nature of con-

(*l*) *Harrison v. Forth*, Prec. Ch. 51.

(*m*) *Ford v. White*, 16 Beav. 120.

(*n*) *Tourville v. Naish*, 3 P. Wms.

307.

(*o*) *Wigg v. W.*, 1 Atk. 382;
Sparke v. Foy, 4 Ch. 35.

(*p*) *Jolland v. Stainbridge*, 3 Ves. 478.

(*q*) *Barnhart v. Greenshields*, 9 Moo. P. C. 18, 36.

(*r*) *Plumb v. Fluitt*, 2 Anst. 438.

structive notice, it is evidently impossible to formulate a concise description of what shall be sufficient to amount thereto. A clear conception as to this can only be reached by means of illustration, and this will be facilitated by the following classification.

i. *Notice of a fact is notice of its causes*; or, in other words, where there has been actual notice of a fact which would have the effect of putting a reasonable person upon further inquiry, the result will be constructive notice of other facts which would be elicited by such inquiry. Notice of a fact, notice of its causes.

(a.) The simplest illustration of this is where a purchaser is informed that the legal estate is in a third person. He is then bound to inquire the reason; and if he does not, he will, nevertheless, be presumed to know the circumstances which have occasioned it, or the terms of a trust attached to the legal estate (s). Similarly, actual notice that the title deeds are in the hands of another man will in general be constructive notice of any charge which he may have thereon (t). If, however, in such a case a *bonâ fide* inquiry is made for the deeds, and the purchaser is then deceived and put off by a plausible and reasonable excuse for their absence, constructive notice will not be imputed to him (u). The Court will clearly impute fraud or gross and wilful negligence in a case where after such notice the purchaser omits all inquiries (x). Where the title deeds are in the possession of a solicitor, this does not amount to a constructive notice of the solicitor's lien thereupon, since such possession is ordinary in the course of business, and as a rule the possession is the cause of the lien, rather than the lien the cause of the possession. Notice that legal estate is outstanding, or that the title deeds are held by a third person.

(b.) Any marked peculiarity in a deed—for instance, the absence or peculiar position of a receipt clause—is considered sufficient to put a person upon inquiry; and if it proves to be connected with the circumstances for which Peculiarities in deeds.

(s) *Anon*, Freem. 137.

449; *Exp. Hardy*, 2 D. & C.

(t) *Birch v. Ellames*, 2 Anst. 427;

393.

Maxfield v. Burton, 17 Eq. 15.

(x) *Worthington v. Morgan*, 16

(u) *Hewitt v. Loosemore*, 9 Ha.

Sim. 547.

the deed might be set aside, it will be held constructive notice of such circumstances (y). It will not, however, be constructive notice of other irregularities in the transaction (z).

Occupation by third person.

(c.) As a general rule, if a person purchases an estate which he knows to be in the occupation of another than the vendor, the fact of such occupation is sufficient to put him upon inquiry. He will therefore be presumed to be aware of and will be bound by all equities which such occupier may have in the land. The purchaser has, in short, actual notice of a fact affecting the property and constructive notice of the circumstances which give rise to it. If the tenancy is under a lease, he will be held to have notice thereof, and of its contents (a). If the tenant in possession has entered into a contract for the purchase of the estate, a subsequent purchaser will be held to have notice of the contract (b). If two persons are together carrying on business on the property, their possession is constructive notice of the title of the partnership (c). The same notice is not, however, implied as between the vendor and purchaser while the matter is still in contract: that is to say, though the subsequent purchaser, if he completes his contract, is bound by the equities of the previous purchaser, he cannot be compelled by the vendor to complete a contract which he had entered into in ignorance of those equities, on the ground that the possession was constructive notice thereof (d). It is plain that an innocent first incumbrancer does not stand on the same footing as a vendor, who is under at least a moral obligation to make full disclosure of any burdens on the property of which he is negotiating a sale.

Actual notice of tenancy.

On the same principle, actual notice that an occupier holds as a tenant of a particular person is constructive

(y) <i>Kennedy v. Green</i> , 3 My. & K. 699.	437, 440.
(z) <i>Greenslade v. Dane</i> , 20 Beav. 284.	(b) <i>Daniels v. Davison</i> , 16 Ves. 249, 17 Ves. 433.
(a) <i>Taylor v. Stibbert</i> , 2 Ves. jr.	(c) <i>Cavander v. Bulteel</i> , 9 Ch. 79.
	(d) <i>Caballero v. Henty</i> , 9 Ch. 447.

notice of the title of the latter (*e*); and actual notice that the tenants pay their rents to a particular person is constructive notice of the terms of their tenancy (*f*). But notice of tenancy is not, it seems, generally notice of the lessor's title (*g*).

(*d.*) The visible appearance of the property in question may be such as to put a purchaser upon inquiry, thus amounting to constructive notice of certain rights respecting it. Thus the fact that there were fourteen chimney-pots upon a house in which there were only twelve flues was held to amount to constructive notice of an easement for the passage of the smoke of an adjoining owner (*h*). The existence of an archway was considered notice of a right of way under it (*i*); and the existence of a sea-wall, notice of an obligation for its maintenance and repair (*k*). The existence of windows is not, however, constructive notice of an agreement giving a right to the access of light to them, since windows are frequently made where they are liable to be obstructed, the builder being content to take his chance of acquiring a right by prescription (*l*).

ii. *Notice of a deed is notice of its contents.*

Visible
appear-
ance of
property.

It is immaterial whether from the description of the parties, or from the recitals or from any other part of the deed, the purchaser would be enabled to discover an interest prior to his own. He must be presumed to be acquainted with the whole contents, and therefore with other deeds to which it necessarily refers (*m*). Thus a conveyance by persons interested as devisees is notice of the will by which they claim (*n*); notice of a lease is notice of the covenants therein (*o*); and notice of a post-nuptial

Notice of a
deed is
notice of its
contents.

(*e*) *Bailey v. Richardson*, 9 Ha. 734.

(*f*) *Knight v. Bowyer*, 2 De G. & J. 421.

(*g*) *Jones v. Smith*, 1 Ha. 43.

(*h*) *Hervey v. Smith*, 22 Beav. 299.

(*i*) *Davies v. Sear*, 7 Eq. 427.

(*k*) *Morland v. Cook*, 6 Eq. 252.

(*l*) *Allen v. Seckham*, 11 Ch. D.

790.

(*m*) *Bisco v. E. of Banbury*, 1 Ch. Ca. 287; *Coppin v. Fernyhough*, 2 Bro. C. C. 291; *Davies v. Thomas*, 2 Y. & C. Ex. 234.

(*n*) *Burgoyne v. Hatton*, Barn. Ch. Rep. 237.

(*o*) *Taylor v. Stibbert*, *sup.*; *Patman v. Harland*, 17 Ch. D. 353.

settlement was held to be notice of an agreement before marriage for a settlement, even though not recited (*p*).

A person is not, however, presumed from one deed to have notice of another referred to therein which does not necessarily affect the property in question, and which he is told does not affect it (*q*). Where in particulars of sale there is a bare reference to a deed which the purchaser can inspect, he will be bound by its contents: but if the vendor purports to state what the contents are, the purchaser may reasonably rely thereupon, and will not be affected by any inaccuracies in the vendor's statement (*r*).

iii. *Actual notice to an agent is constructive notice to his principal.*

Notice to agent is notice to principal.

It is well established that notice to the agent, solicitor, or counsel of a purchaser is constructive notice to himself (*s*); and the same rule applies though the same person may act as agent of both vendor and purchaser (*t*).

Limitation of this principle.

But this principle must be understood with some limitations. Thus—

Notice must be in the same transaction,

(*a*.) In order to affect the principal with constructive notice the actual notice must have been given to the agent in the same transaction (*u*), or at least in a transaction so closely connected with the one in question as to be necessarily present to the mind of the agent when engaged therein (*x*).

and of material facts.

(*b*.) The notice, in order to be imputed to the principal, must be notice of facts material to the question at issue, and such as it is the duty of the agent to communicate (*y*).

Solicitor

(*c*.) The employment of a solicitor to do a merely minis-

(*p*) *Ferrars v. Cherry*, 2 Vern. 383.

(*q*) *Jones v. Smith*, 1 Ha. 43.

(*r*) *Cox v. Coventon*, 31 Beav. 378.

(*s*) *Sheldon v. Cox*, 2 Ed. 228; *Newstead v. Serles*, 1 Atk. 265.

(*t*) *Fuller v. Bennet*, 2 Ha. 402;

Tweeddale v. T., 23 Beav. 341.

(*u*) *Warwick v. W.*, 3 Atk. 294;

Hamilton v. Royse, 2 S. & L. 327.

(*x*) *Hargreaves v. Rothwell*, 1 Kee. 159.

(*y*) *Wyllie v. Pollen*, 32 L. J. Ch. N. S. 782.

terial act, such as to procure the execution of a deed, does not so constitute him an agent as that notice to him shall be constructive notice to his employer (z). employed only ministerially.

(d.) If a solicitor acting for both parties is guilty of a concealment from one of them with the cognisance of the other, the former is not affected with constructive notice (a); nor if he is himself the author of a distinct fraud in the same transaction is his knowledge thereof imputed to the employer (b), since it is not to be presumed that the solicitor would make a disclosure of such a fact (c). The mere fact of his having been guilty of fraud at some other time in respect of the same property will not prevent the imputation of his knowledge in accordance with the ordinary rule (d). Solicitor guilty of fraudulent concealment.

(e.) The mere fact of two companies having the same solicitor or one or more directors in common does not affect each company with notice of the affairs of the other (e). Two companies with same solicitor or a director in common.

(3.) *Matters analogous to constructive notice.*

Knowledge is sometimes, by presumption of law, imputed to parties after a manner analogous to the principle of constructive notice. Analogous matters.

(i.) Everyone is presumed to know the law. *Ignorantia legis neminem excusat.* And this is as applicable to public statutes as to the general principles of law, civil and criminal. But a private Act of Parliament is not presumed to be known. In order to bind there must be actual notice thereof (f). Public statutes.

(ii.) The registration of an action as a *lis pendens* is binding on subsequent purchasers, taking its effect from the service of the writ (g). The statement of a special case amounts to a *lis pendens*, and is binding when regis- Lis pendens:

(z) *Wyllie v. Pollen*, *sup.*

(a) *Sharpe v. Foy*, 4 Ch. 35.

(b) *Kennedy v. Green*, 3 My. & K. 699.

(c) *Waldy v. Gray*, 20 Eq. 238.

(d) *Atterbury v. Wallis*, 8 De G. M. & G. 454; *Boursot v. Savage*, 2 Eq. 134.

(e) *In re Marseilles &c. Co.*, 7 Ch. 161.

(f) *E. of Pomfret v. Lord Windsor*, 2 Ves. sr. 480; *sup.* pp. 178 *et seq.*

(g) R. S. C., O. II., r. 1; *B. of Winchester v. Paine*, 11 Ves. 197.

tered (*h*). The principle applies as well to dealings of the plaintiff as to those of the defendant. Neither party may alien the property in dispute to the prejudice of the other (*i*). It is necessary, however, that some specific claim should have been made in the suit to the particular property in question (*k*). Thus an action for a general account does not bind all the real and personal estate to which it relates (*l*). A *lis pendens*, again, does not create a charge or lien upon the property; it merely puts a purchaser upon an inquiry as to the validity of the plaintiff's claim (*m*).

effect of. (iii.) It has been seen that the registration of deeds is not constructive notice so as to affect a purchaser taking the legal estate (*n*); but if a purchaser search the register he will be presumed to have notice thereof, unless he can show that the search did not extend to the time of the actual registration (*o*). Similarly, under the former law, judgments were not notice unless a search had actually been made (*p*). By 23 & 24 Vict. c. 38, it was enacted that no judgment, statute, or recognisance should affect any land as to a *bonâ fide* purchaser for value, although with actual notice, unless a writ of execution was issued within three months of the registration; and now, by 27 & 28 Vict. c. 112, no judgment, statute, or recognisance affects any land until such land shall have been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority.

General
rule.

II. Defence of Purchase for Value without Notice.

A general rule laid down in the important case of

BASSET v. NOSWORTHY

[Rep. t. Finch, 102; 2 W. & T. L. C. 1]

is that equity will give no assistance to the legal title

(*h*) R. S. C., O. XXXIV.
(*i*) *Bellamy v. Sabine*, 1 De G. & J. 566, 580.
(*k*) *Holt v. Derell*, 4 Ha. 446.
(*l*) *Walker v. Flamstead*, 2 Ld. Ken., pt. 2, 57, 59; *Exp. Thornton*, 2 Ch. 176.

(*m*) *Bull v. Hutchens*, 32 Beav. 615.
(*n*) See *Bushell v. B.*, 1 S. & L. 103.
(*o*) *Hodgson v. Dean*, 1 S. & S. 221.
(*p*) *Lane v. Jackson*, 26 Beav. 535.

against a *bonâ fide* purchaser without notice of an adverse title.

Three cases may arise in which a defendant may plead that he is a purchaser for valuable consideration without notice. Either the plaintiff in equity may have an equitable title, and may seek the assistance of the Court to establish it against a defendant who has secured the legal estate; or the legal estate may be outstanding, and the parties before the Court set up conflicting equitable interests; or the plaintiff may himself have the legal estate, and may be seeking to add to it the equitable interest as well.

1. *Where the defendant has the legal estate.*

No maxim is better known than that where the equities are equal the law shall prevail. Acting in conformity with this rule, Courts of equity will uniformly acknowledge the defence of a defendant who has the legal estate, and who pleads that he is a purchaser for value without notice. It will in such a case refuse to assist the plaintiff, but will leave the parties to the position in which the law places them (r). This may be thus illustrated:—A., the owner of an estate, contracts to sell it to B., and B. pays a part of the purchase-money before the estate is legally conveyed to him. A. then sells the estate to C., who has no knowledge of the transaction with B.; C. pays his purchase-money, and the estate is legally conveyed to him. If, then, B. comes into equity to seek to enforce against the estate the lien to which as a purchaser equity would under other circumstances have held him entitled, the relief will be refused to him. It will be held that C. has as good a right in conscience to the full enjoyment of his estate as B. has to security for his prematurely paid purchase-money; equity, therefore, will refuse to interfere with the advantage which he derives from his legal position.

If the defendant who pleads his *bonâ fide* purchase for value without notice has not secured the legal estate at

Where defendant has legal estate equity will not relieve.

Legal estate subsequently acquired.

(r) *Pitcher v. Rawlins*, 7 Ch. 259.

the time of his purchase, but has subsequently acquired it, his plea is equally good; and this notwithstanding that in the interval between his purchase and his acquiring the legal title he may have had notice of the prior transaction of the plaintiff (s). His own equity being equal to the plaintiff's, he will not be deprived of the advantage which he gains through his superior activity and diligence. Indeed, where his original position in equity has been secured in good faith, the Courts have been little scrupulous to inquire how he has come by the legal estate. Where it was acquired by fraud (t), and where it depended on a forged will (u), it was still considered sufficient to strengthen the equity against a plaintiff. Moreover, a purchaser will not be deemed to have notice of a prior equity merely because he gets the legal estate through an instrument which discloses that equity, if he had no knowledge of such instrument at the time of his purchase (x). Sir W. M. James, L. J., there said: "When once you have arrived at the conclusion that the purchaser is a purchaser for valuable consideration without notice, the Court has no right to ask him how he is going to defend himself, or what he is going to rely on."

Legal
estate no
protection
if acquired
by a breach
of trust.

There is, however, this limitation upon the power of a purchaser to secure himself by subsequently acquiring the legal estate: he cannot do so by becoming a party to a breach of trust. Thus it will not avail him to take a conveyance from a trustee when he has knowledge of the trust. If he does so, he himself becomes a trustee, and the legal estate will be no assistance to him (y). Thus a trustee for successive incumbrancers cannot, by conveying the legal estate to one of them, confer on him priority over the others (z).

(s) *Goleborn v. Alcock*, 2 Sim. 552;
Blackwood v. London, &c., Bank, 5
L. R. P. C. C. 111.

(t) *Harcourt v. Knowel*, cited 2
Vern. 159.

(u) *Jones v. Powles*, 3 My. & K. 581.

(x) *Pilcher v. Rawlins*, 7 Ch. 259.

(y) *Saunders v. Dehew*, 2 Vern.
271; *Allen v. Knight*, 5 Ha. 272;
11 Jur. 527.

(z) *Collyer v. Finch*, 19 Beav. 500;
5 H. L. 905.

Not only where the defendant purchaser has the legal estate, but where he has the best right to call for it, equity will not grant relief against him. This will be the case where one of two or more persons who are interested in equity has, in addition to the interest which he holds in common with the others, a special equity peculiar to himself—for instance, a particular declaration of trust in his favour (a).

Where defendant has best right to call for the legal estate.

Where, moreover, there are circumstances which give rise to a mere equity as distinguished from an equitable estate—as, for example, to set aside a deed for fraud, or to correct a mistake—and the purchaser under the instrument maintains the plea of purchase for valuable consideration without notice, the Court will not interfere against him (b).

Same rule where the plaintiff asserts a mere equity.

2. Where the legal estate is outstanding.

Where the legal estate is outstanding, another maxim is applicable—*Qui prior est tempore potior est jure*. Thus the defence of a purchase for value without notice will not avail against a prior equitable incumbrancer. It is a well known principle, elsewhere fully expounded (c), that a third mortgagee who lent his money without notice of the second mortgage may gain priority over that incumbrance by buying in the first mortgage with the legal estate. But no such priority would be gained if the first was a merely equitable mortgage (d).

Where legal estate is outstanding, priority determined by time.

Where, however, a fund is in Court, or the legal estate is outstanding in a trustee, and the estate is claimed by several adverse but innocent purchasers for value without notice, the Court will declare the right to the fund, will make a decree against some one or more of the purchasers for value, and will then, to give effect to its decree, order the delivery up of the title deeds to the person held to have the best title (e).

Fund in Court or legal estate in trustee.

(a) *Willoughby v. W.*, 1 T. R. 763; *Wilmot v. Pike*, 5 Ha. 14.

(b) *Phillips v. P.*, 4 De G. F. & J. 208; *Sturge v. Starr*, 2 My. & K. 195.

(c) *Sup.* pp. 245, et seq.

(d) *Phillips v. P.*, *sup.*; *Brace v. D. of Marlborough*, 2 P. Wms. 491.

(e) *Stackhouse v. C. of Jersey*, 1 J. & H. 721; *Newton v. N.*, 4 Ch. 144.

Trustee making good one breach of trust by another.

Where a trustee has committed a breach of trust, and has afterwards made that default good by applying another trust fund for that purpose, the Court will not deprive the first *cestuis que trusts* of the fund thus placed at their disposal at the expense of the *cestuis que trusts* of the second fund. The former are considered as purchasers for value without notice, and so entitled to protection (*f*).

3. Where the plaintiff has the legal estate.

Where the plaintiff had legal estate,

Previous to the Judicature Act (*g*), when a plaintiff who had the legal estate sought the assistance of equity to perfect his interest, and the defendant pleaded a *bonâ fide* purchase for value without notice, a distinction was taken according to the nature of the relief which he asked.

It might be that, as in *Basset v. Nosworthy* (*h*), he desired to obtain from the defendant discovery of some instrument relating to the title, or some similar assistance which could not be afforded to him by a Court of law. In other words, his application might be to the *auxiliary* jurisdiction of the Court. Or, on the other hand, the plaintiff might sue in equity in a matter in which the Court of Chancery exercised a legal jurisdiction concurrently with the Courts of law.

and appealed to auxiliary jurisdiction, Court would not assist him.

In the former case it was well established that if the defendant successfully maintained a plea of purchase for value without notice, equity would not assist the plaintiff against him (*i*). It mattered not that the plaintiff was actually in possession of the property under a legal title (*k*), or whether the property in question was legal or personal estate (*l*). The reasoning was that the defendant had an equal claim with the plaintiff in equity, and that equity would therefore not interfere with his rights.

Secus where he appealed

In the latter case, however, it was held that the same plea would not avail. Where a widow filed a bill claiming

(*f*) *Thornelyke v. Hunt*, 3 De G. & J. 563.

(*g*) 36 & 37 Vict. c. 66.

(*h*) *Sup.* p. 286.

(*i*) *Burluse v. Cooke*, Freem. 24 ;

Jerrard v. Saunders, 2 Ves. 454.

(*k*) *Wallbegn v. Lee*, 9 Ves. 24 ;

Joyce v. De Moleyns, 2 J. & L. 374.

(*l*) *Durson v. Prince*, 2 De G.

& J. 41.

dower against a purchaser for value without notice from her husband, the plea of the purchase was overruled (*m*); and the same was the case in a bill for tithes (*n*); the true ground for the decisions being that the Court was not there asked to give to the plaintiff any equitable as distinguished from legal relief (*o*).

The case of a legal mortgagee seeking foreclosure was in some respects exceptional. It was held that he was entitled to a decree against a *bonâ fide* purchaser, notwithstanding that the latter had advanced his money without notice of the prior incumbrance (*p*). In this case the plaintiff seeks an equitable remedy attached to his legal right, with respect to which he cannot be told to seek his remedy at law; so that his position differs from that of a plaintiff who through the medium of a Court of equity seeks to enforce a legal claim. But though he might get his foreclosure decree, it was held that he was not entitled at the same time to an order for the delivery of title deeds, as to which the defence would avail just as if a suit had been instituted for that purpose alone (*q*). And for the same reason the Court would not decree a sale instead of a foreclosure, under 15 & 16 Vict. c. 86, since the completion of the sale would involve a surrender of the title deeds, which the Court would not insist on (*r*).

But by the Judicature Act (*s*) every Court can now enforce both legal and equitable claims (*t*), and recognise equitable defences (*u*). There is, therefore, no longer any distinction between the auxiliary and the concurrent jurisdiction of the Courts of equity; and the same reasoning which applied to *Williams v. Lambe* and *Collins v. Archer* would now apply to such cases as *Basset v. Nosworthy* and *Wallwyn v. Lee*. It does not seem to have been

to the concurrent jurisdiction.

Legal mortgagee seeking foreclosure entitled to relief.

Effect of Jud. Act, 1873, s. 24, sub-s. 6.

(*m*) *Williams v. Lamb*, 3 Bro. C. 500.
C. 264.

(*n*) *Collins v. Archer*, 1 R. & M. 284.

(*o*) *Phillips v. P.*, 4 De G. F. & J. 208, 217.

(*p*) *Finch v. Shaw*, 19 Beav.

(*q*) *Heath v. Crealock*, 10 Ch. 22.

(*r*) *Waldy v. Gray*, 20 Eq. 238.

(*s*) 36 & 37 Vict. c. 66.

(*t*) S. 24, sub-s. 6.

(*u*) Sub-s. 2.

decided that this enactment has the effect of requiring the Courts now to consider on their merits all cases in which this defence is raised ; but this will probably be the result. Formerly, in cases where discovery was sought, equity declined to assist the plaintiff on the ground that he had his remedy at law, and that it would not add its relief to this remedy against a *bonâ fide* purchaser. Now the plaintiff may insist on his legal remedy in the same Court and at the same time that he seeks his equitable relief, and to allow the defence of a *bonâ fide* purchase to bar him would be to deprive him of an acknowledged legal right (x).

4. *Mode of raising the defence.*

Form of
pleading.

Previous to the Judicature Acts (y) the defence of being a purchaser for value without notice was raised by plea. Now the form of pleading is different. If the statement of claim shows that the defendant is a purchaser for value without notice, the defendant may now, it would seem, object by demurrer. If, however, as will almost always be the case, the statement of claim does not so admit the defendant's position, his course will be to plead it by statement of defence. But whatever deeds he purports to set forth in his pleading he may be required to produce for the inspection of the plaintiff, who has a right to see whether they are correctly stated (z).

5. *Where a bonâ fide purchaser is plaintiff.*

The purchaser
may some-
times come
as plaintiff.

In some cases equity will allow more than a merely negative force to the position of a *bonâ fide* purchaser for value. It will suffer him to come as a plaintiff to seek the delivery up and cancellation of documents which stand in the way of his complete security. Thus sleeping mortgages or incumbrances, under which no claim has been made for a long time, will be vacated in his favour (a).

(x) Coote, 864.

(y) 36 & 37 Vict. c. 66 ; 38 & 39 Vict. c. 77.

(z) *Hunt v. Elwes*, 27 Beav. 62 ;

2 De G. F. & J. 578.

(a) *Rutter v. Bartley*, Toth. 160 ;
Abdy v. Loveday, Rep. t. Finch,
250.

III. *Liability of Purchasers for Application of Purchase-Money.*

Since the decision in

ELLIOT v. MERRYMAN,

[2 Atk. 4; 1 W. & T. L. C. 64,]

which has always been quoted as a leading authority on the liability of purchasers from trustees to see to the application of the purchase-money, the whole law on the subject has been put on a different footing by the statutes to be presently referred to. These statutes, however, being of comparatively recent date, and not retrospective, there still occur many cases to which the old law is applicable. It is, therefore, necessary to consider first the principles applied by Courts of equity in cases where the statutes are not applicable; secondly, the operation of the statutes.

1. *As to personal property.*

(1.) However personal estate may be bequeathed, it must be applied in the first place by the executors or administrators for payment of the testator's debts, in a due course of administration. The general rule is abundantly established that a person who purchases or takes a mortgage of leaseholds or other personalty from an executor or administrator is not bound to see to the application of the purchase or mortgage money. The sale or mortgage of a chattel by an executor will be good against both the residuary and pecuniary legatees, as well as against the creditors of the testator. Their remedy, in case of the misapplication of the money by the executor, would be not against the purchaser or mortgagee, but against the executor himself; neither notice of the will, nor of the bequest contained therein, would be prejudicial to the purchaser or mortgagee (b). And the fact that a mortgage of part of

Purchaser
of per-
sonalty not
generally
liable.

Notice im-
material.

(b) *Ewer v. Corbett*, 2 P. Wms. C. C. 125.
148; *Andrew v. Wrigley*, 4 Bro.

the assets has been made to secure a debt originally contracted on the personal security of the executor, and without reference to the assets, is immaterial (*d*).

So a banker may pay cheques of executor.

Upon the same principle as that applicable to sales by executors, a banker will not be held liable for paying the cheque of an executor who banks with him, and who misapplies the money; unless the banker is cognisant of an intended misapplication amounting to a breach of trust (*e*).

Exceptions:

1. Where there is a particular trust of personalty.

(2.) The Master of the Rolls, in *Elliot v. Merryman* (*f*), recognised two exceptions from the general rules. First, the personal estate may be clothed with such a particular trust that the Court may require a purchaser thereof to see the money rightly applied. See also *Bonney v. Ridgard* (*g*).

2. Where purchaser is party to a fraud, which may be inferred from circumstances.

Secondly, where there is fraud on the part of a purchaser or mortgagee he remains answerable. Fraud may be inferred from circumstances; for instance, where an executor disposes of or pledges his testator's assets in payment of, or as security for, his own debt. In such a case the purchaser or pledgee would take subject to the claims of creditors, and also of the specific and general legatees of the testator (*h*). In the absence, however, of a fraud or collusion, or of knowledge on the part of the assignee that the debts of the testator were not all paid, the assignment by an executor as a security for his own debt of a chattel specifically bequeathed to him would be good (*i*). Sale at an undervalue may suffice to raise a presumption of collusion, so as to render a purchaser liable (*k*).

Acquiescence by legatees and creditors.

On the other hand, length of time and acquiescence will prevent creditors and legatees from asserting their claim against purchasers; and the fact of the legacies being contingent would be no sufficient excuse for the legatees lying by,

(*d*) *Miles v. Durnford*, 2 De G. M. & G. 641.

(*e*) *Gray v. Johnston*, 3 L. R. H. L. 1.

(*f*) 2 Atk. 4.

(*g*) 4 Bro. C. C. 140.

(*h*) *Hill v. Simpson*, 7 Ves. 152.

(*i*) *Taylor v. Hawkins*, 8 Ves. 209; *Crane v. Drake*, 2 Vern. 616.

(*k*) *Ewer v. Corbet*, 2 P. Wms. 148; *Scott v. Tyler*, 2 Dick. 725.

if they had such an interest as entitled them to know what debts the testator owed, and what part of his estate had been applied in payment of them (*l*).

2. *As to real property.*

(1.) Land devised on trust for sale for payment of debts, &c.

At law trustees in whom real property was vested could of course give a valid discharge for the purchase-money. But the persons amongst whom the produce of the sale was to be distributed being considered in equity the owners, Courts of equity held that a purchaser must obtain a discharge from them, unless the power of giving receipts was either expressly or by implication given to the trustees. And if no such discharge was given, and the trustees had no power to give receipts, the estate, upon a misapplication of the purchase-money, remained chargeable in the hands of the purchaser.

Where a power of giving receipts was in express terms conferred upon trustees, the purchaser was not, in the absence of fraud or collusion, bound to see to the application of the purchase-money. If no such power was given in express terms, there was frequent difficulty in determining whether such a power could be implied.

As to this, one of the rules laid down in *Elliot v. Merryman* (*n*), and which was invariably followed, was that if the testator directed lands to be sold for the payment of certain debts, mentioning in particular to whom those debts were owing, the purchaser was bound to see that the money was applied for the payment of those debts. And the same rule was applicable where there was a trust for payment of legacies or annuities, which from their nature were placed on the same footing as specified or scheduled debts (*n*). In cases coming within this rule, the trusts being of a limited and definite nature, and such as a

Land devised for payment of debts.

Contrast of law and equity.

Where express power to give receipts provided.

Power, when implied.

Not in case of scheduled debts and legacies.

(*l*) *Andrew v. Wrigley*, 4 Bro. C. C. 135.
(*n*) 2 Atk. 4.

(*n*) *Johnson v. Kennett*, 3 My. & K. 624, 630; *Horn v. H.*, 2 S. & S. 448.

purchaser might without inconvenience see properly performed, a power to give receipts could not be implied.

But otherwise where trust was for payment of debts generally;

Another rule was that if the testator directed the land to be sold for the payment of debts generally, the purchaser was not bound to see the money rightly applied. In such cases it was esteemed that the trust was of too general and unlimited a nature to be undertaken by a purchaser; and it was therefore held that an implied power was bestowed on the trustees to give receipts in full discharge for the purchase-money.

though followed by trust to pay legacies.

If the trust included at the same time the payment of legacies and annuities and the payment of debts, the latter principle was clearly the one to be applied, since it was only after the execution of the general trust to pay debts that the limited trust to pay legacies would arise. The purchaser's position, therefore, would be just the same as in a general trust for payment of debts only (o).

Annuities not distinguishable from legacies.

In some cases it was sought to distinguish annuities from legacies (p), but neither on principle or authority could such a distinction be supported. And if there was a general charge of debts it was held immaterial that one particular debt was mentioned (q). And, again, where there was a trust for payment of debts generally and also legacies, a purchaser, even after the debts had in fact been paid, was held not liable to see to the application of the purchase-money in payment of the legacies (r).

Immaterial that debts have in fact been paid,

Lord Lyndhurst in so deciding pointed out that the rule had reference to the state of things at the death of the testator (s). Suppose, then, there were no debts when the testator died. Lord St. Leonards considered this in *Stroughill v. Anstey* (t), and said that all these cases must stand on one of two grounds—either that there were no debts within the knowledge of the purchaser (and then it

or that there were no debts.

(o) *Johnson v. Kennett*, 3 My. & K. 624; *Page v. Adam*, 4 Beav. 269.

(p) *Johnson v. Kennett*, *sup.*; *Eland v. E.*, 1 Beav. 235.

(q) *Robinson v. Lowater*, 17 Beav.

592; 5 De G. M. & G. 272.

(r) *Johnson v. Kennett*, *sup.*

(s) See also *Forbes v. Peacock*, 1 Ph. 717.

(t) 1 De G. M. & G. 635.

was indifferent whether there were no debts at the death of the testator or no debts at the time of the purchase), or (which was more satisfactory and open to no ambiguity) on the ground that when a testator by his will charged his estate with debts and legacies, he showed that he meant to entrust his trustees with the power of receiving the money, anticipating that there would be debts, and thus providing for the payment of them. It was by implication a declaration by the testator that he intended to entrust the trustees with the receipt and application of the money, and not to throw any obligation at all upon the purchaser or mortgagee. That intention did not cease because there were no debts. Basing the principle, therefore, not on this or that state of facts, but on the indication afforded of the testator's intention, his lordship decided that whenever there was a trust for the payment of debts generally and legacies, a purchaser or mortgagee was under no obligation to see to the application of the money raised. This enunciation of the principle recommends itself by its simplicity and certainty in application.

Although there was no trust for the general payment of debts, it would have been implied that it was the intention of the settlor or testator to confer upon the trustees a power to give receipts, if they were directed to sell at a time when the persons amongst whom they were to distribute the proceeds of the sale were either not ascertainable or not of age (*u*), and it was not deemed material that the objects of the trust might have been actually ascertained before the sale. The deed must receive its construction as from the moment of its execution. The purchasers not having been originally liable could not be made so by any subsequent event (*x*). If, however, an estate was charged with a sum of money payable to an infant on his attaining his majority, the purchaser was bound to see the money duly paid (*y*).

Direction
to sell at
particular
time,

(*u*) *Balfour v. Welland*, 16 Ves.
151.

(*x*) *Groom v. Booth*, 1 Drew, 548.
(*y*) *Dickenson v. D.*, 3 Bro. C. C. 19.

or trusts
declared
involving
personal
discretion.

Where money to arise from a sale was not merely to be paid to certain persons, but was to be applied by the trustees upon trusts requiring care and discretion, the presumption was that the settlor intended to confide the execution of the trust to the trustees solely, and the purchaser was not then bound to see to the application of the purchase-money (*z*).

Purchaser
not bound
to inquire
whether
sale was
necessary,

A purchaser was not bound to ascertain how much land it was necessary to sell for payment of the debts (*a*). And where lands were devised to trustees upon trust to raise so much money as the personal estate should fall deficient in paying the testator's debts and legacies, a purchaser was not bound to inquire whether the real estate was wanted or not. *Secus*, however, if the trustees had merely a *power* to raise money upon the deficiency of the personal estate, for then, unless there was a deficiency the power never arose, and consequently the purchaser could take no estate by the supposed execution of it (*b*).

unless
power to
sell only
arose on
deficiency.

Land
charged
with debts:
same rules
apply.

(2.) Land devised charged with debts, &c. It was laid down in *Elliot v. Merryman* (*c*) that the rules as to a purchaser's liability were the same where land was devised charged with debts or legacies, or both, as where it was devised expressly upon trust for these purposes, the charge being considered equivalent to a trust (*d*). The authorities already mentioned as referring to one case may, therefore, generally be considered as also illustrating the other. There are, however, certain matters particularly relating to such charges which require separate consideration. Prominent among these is the question whether a charge of debts authorised a sale of real estate by executors.

It was laid down by Sir L. Shadwell, V.C., in *Forbes v. Peacock* (*e*), that if a testator charged his real estate with

(*z*) *Doran v. Wiltshire*, 6 Swanst. 699.

(*a*) *Spalding v. Shalmer*, 1 Vern. 303.

(*b*) *Culpepper v. Aston*, 2 Ch. Ca. 115; *Bird v. Fox*, 11 Ha. 40.

(*c*) 2 Atk. 4.

(*d*) See also *Jenkins v. Hiles*, 6 Ves. 654, note; *Page v. Adam*, 4 Beav. 269; *Shaw v. Borrer*, 1 Kee. 559.

(*e*) 12 Sim. 528, 541.

payment of his debts, that, *primâ facie*, gave the executor power to sell the real estate, and to give the purchaser a good discharge for the purchase-money. This was sustained to a certain extent in *Shaw v. Borrer* (f) and in *Ball v. Harris* (g), but it has been questioned whether such a charge conferred a *legal* power to sell, and whether, in consequence, a defendant in a suit for specific performance ought to be compelled to complete the purchase without a conveyance from the heir-at-law (h). The decisions on this point have been somewhat conflicting (i). The conclusion to be drawn from them seems to be that where there was a general charge of debts upon real estate the executors had in equity an implied power to sell it, and they alone could give a valid receipt for the purchase-money; but that they did not take by implication a legal power to sell, and could not, therefore, convey the legal estate, it being necessary to complete the purchaser's title that the persons in whom it was vested (if not already in the executors by devise or otherwise) should concur in the conveyance (k).

Whether it gives power of sale to executors.

Equitable power not legal.

Real estate in the hands of an alienee of a devisee or heir-at-law, where there had been *no* charge of debts, was discharged from the debts, the heir or devisee alone remaining personally liable (l). But a mere conveyance to new trustees was not such an alienation as would have prevented the interest so aliened from being affected by an execution at the suit of the devisor's creditors (m).

Where no charge, lands exempt in hands of alienee from heir or devisee.

Where, however, there *was a charge of debts* upon real estate, a purchaser from the heir or devisee, or their alienee, could not safely complete without either the concurrence of the executors or without being satisfied that all the debts had been paid (n). The general opinion seems to

Secus where debts were charged.

(f) *Sup.*

(g) 4 My. & Cr. 264.

(h) *Gosling v. Carter*, 1 Coll. 644.

(i) *Doe, d. Jones v. Hughes*, 6 Exch. 223; *Robinson v. Lowater*, 17 Beav. 532; *Wrigley v. Sykes*, 21 Beav. 337.

(k) *Hodkinson v. Quinn*, 1 J. &

H. 303, 309.

(l) *Richardson v. Horton*, 7 Beav. 112.

(m) *Coope v. Creswell*, 2 Ch. 112, 122.

(n) *Storry v. Walsh*, 18 Beav. 559.

have been that where, subject to a charge of debts, an estate was devised to persons either beneficially or as trustees for special purposes, a sale could be effected by them alone. And where there was an express trust for sale at a particular period which had arrived, the trustees could sell without the concurrence of the executors, who might previously have sold under the implied power arising from a general charge of debts (o).

Purchaser
always
liable if
party to a
breach of
trust,

The rule that a purchaser was not bound when the debts were charged generally, was subject to the obvious exception that if he was a party to a breach of trust he would receive no protection; for instance, where a devisee, having a right to sell, sold to pay his own debt, and the purchaser had notice of these facts (p). The fact, however, that an executor who was also devisee mortgaged his private property, together with property devised to him charged with payment of debts, would not have raised a presumption against him that he was not acting in the ordinary discharge of his duty as executor. Where trustees, instead of selling under a power in a will, raised money by mortgage in a manner not authorised by the power, many years after the testator's death, the mortgagee being party to a breach of trust, his security was invalid (q); but the mortgagee in such a case was entitled to stand as a creditor in respect of the produce of the estates, to the extent to which the mortgage money was rightly applied (r).

or has
notice of
adminis-
tration
suit.

Another exception was where the purchaser had notice of a suit having been instituted which took the administration of the estate out of the trustees' hands (s).

3. *Statutory modifications of the principles.*

It now remains to consider how these principles, which rested on the decisions of the Courts, have been affected by statutory enactments.

(o) *Hodkinson v. Quinn*, 1 J. & H. 303.

(p) *Eland v. E.*, 4 My. & Cr. 427.

(q) *Stroughill v. Anstey*, 1 De G.

M. & G. 635.

(r) *Devaynes v. Robinson*, 24 Beav. 86.

(s) *Lloyd v. Baldwin*, 1 Ves. 173.

(1.) As to purchasers' liability.

i. By 7 & 8 Vict. c. 76, s. 10, it was enacted that the *bonâ fide* payment to and receipt of any person to whom any money should be payable upon any express or implied trust, or for any limited purpose, should effectually discharge the person paying the same from seeing to the application, or being answerable for the misapplication thereof, unless the contrary should be expressly declared by the instrument creating the trust or security. This Act, however, only remained in operation from December 31st, 1844, to October 1st, 1845, it having been repealed by 8 & 9 Vict. c. 106. It therefore affects only such wills, &c., as were executed between these two dates.

As to
purchasers'
liability.
7 & 8 Vict.
c. 76.

8 & 9 Vict.
c. 106.

ii. The law is now chiefly regulated by the provisions in this respect of Lord St. Leonards' Act (*t*), which was passed and came into operation on August 13th, 1859. By sect. 23 of this Act it is enacted "that the *bonâ fide* payment to, and the receipt of, any person to whom any purchase or mortgage money shall be payable upon any express or implied trust, shall effectually discharge the person paying the same from seeing to the application, or being answerable for the misapplication thereof, unless the contrary shall be expressly declared by the instrument creating the trust or security." It seems the better opinion that this clause applies only to trusts created since the Act (*u*).

22 & 23
Vict. c. 35.

s. 23.

iii. A more comprehensive power, in that it is not confined to purchase or mortgage money, was given by Lord Cranworth's Act (*x*), which enacted that the receipts in writing of any trustees or trustee for *any money payable to them or him* by reason or in the exercise of any trusts or powers reposed or vested in them or him, should be sufficient discharges for the money therein expressed to be received, and should effectually exonerate the persons paying such money from seeing to the application thereof, or from being answerable for any loss or misapplication thereof."

23 & 24
Vict. c.
145, s. 29.

(*t*) 22 & 23 Vict. c. 35.

(*u*) Lewin, 7 ed. 270.

(*x*) 23 & 24 Vict. c. 145, s. 29.

s. 34. By sect. 34 of this same Act, its operation was expressly declared to be not retrospective. It therefore extended only to persons entitled or acting under a deed, will, codicil, or other instrument executed after the 28th of August, 1860, or under a will or codicil confirmed or revived by a codicil executed after that date.

44 & 45
Vict. c. 41,
s. 36. This is now replaced by a still more comprehensive section in the Conveyancing and Law of Property Act, 1881, which extends the power to any securities, or other personal property or effects payable, transferable or deliverable to any trustees or trustee (x).

(2.) As to the power of sale.

As to
power of
sale. Lord St. Leonards' Act also contains important provisions respecting the powers of trustees and executors to sell, in various circumstances. Thus,

22 & 23
Vict. c. 25,
s. 14. Sect. 14 provides that "Where by any will which shall come into operation after the passing of this Act the testator shall have charged his real estate or any specific portion thereof with the payments of his debts, or with the payment of any legacy or other specific sum of money, and *shall have devised the estate so charged* for the whole of his estate and interest therein, and shall not have made any express provision for the raising of such debt, legacy, or sum of money out of such estate, it shall be lawful for the said *devisee or devisees in trust*, notwithstanding any trusts actually declared by the testator, to raise such debts, legacy, or money as aforesaid by a sale and absolute disposition by public auction or private contract of the said hereditaments or any part thereof, or by a mortgage of the same, or partly in one mode and partly in the other; and any deed or deeds of mortgage so executed may reserve such rate of interest, and fix such period or periods of repayment, as the person or persons executing the same shall think proper." This, it will be observed, disposes of the difficulty which caused so much discussion in *Doe v. Hughes* and *Robinson v. Lowater* (y).

(x) 44 & 45 Vict. c. 41, s. 36.

(y) *Supra*, p. 299.

Sect. 15 provides that "The powers conferred by the last ^{s. 15.} section shall extend to all and every person or persons in whom the estate devised shall for the time being be vested by survivorship, descent, or devise, or to any person or persons who may be appointed under any power in the will, or by the Court of Chancery, to succeed to the trusteeship vested in such devisee or devisees in trust as aforesaid."

Sect. 16 confers a similar power of sale in the circum- ^{s. 16.} stance therein mentioned *on executors*. It enacts that "If any testator who shall have created such a charge as is described in the 14th section shall *not have devised* the hereditaments charged as aforesaid in such terms as that his whole estate and interest therein shall become vested in any trustee or trustees, the *executor or executors* for the time being named in such will (if any) shall have the same or the like power of raising the said monies as is hereinbefore vested in the devisee or devisees in trust of the said hereditaments, and such power shall from time to time devolve to and become vested in the person or persons (if any) in whom the executorship shall for the time being be vested ; but any sale or mortgage under this Act shall operate only on the estate and interest, whether legal or equitable, of the testator, and shall not render it unnecessary to get in any outstanding subsisting legal estate."

It will be observed that this section does not entrust any such power to an administrator.

By sect. 17 purchasers and mortgagees are declared ^{s. 17.} not to "be bound to inquire whether the powers conferred by sections 14, 15, and 16 of this Act, or either of them, shall have been duly and correctly exercised by the person or persons acting in virtue thereof."

Sect. 18 provides that "The provisions contained in sects. ^{s. 18.} 14, 15, and 16 shall not in any way prejudice or affect any sale or mortgage already made or hereafter to be made under or in pursuance of any will coming into operation

before the passing of this Act, but the validity of any such sale or mortgage shall be ascertained and determined in all respects as if this Act had not passed ; and the said several sections shall not extend to a devise to any person or persons in fee or in tail, or for the testator's whole estate and interest charged with debts or legacies, nor shall they affect the power of any such devisee or devisees to sell or mortgage as he or they may by law now do."

To make this section consistent with sect. 14 the "devise" referred to therein must mean a *beneficial* devise ; and "devisee or devisees," *beneficial* devisee or devisees ; and the inference would seem to be that, in the view of the framer of the Act, no legislative assistance was needed in the case of a beneficial devise subject to a charge. Indeed the concluding words of the section are tantamount to a declaration of the legislature that beneficial devisees subject to a charge have power to sell or mortgage (z).

General
effect of
the statute.

The general effect of the statute may thus be summed up :—It has removed the difficulty created by the decisions in two cases : 1st, by giving a devisee of the fee, who is a trustee for totally foreign purposes, a power to sell or mortgage for the satisfaction of the charge of debts ; and, 2ndly, by giving the executor a power to sell or mortgage when the estate is cut up by successive limitations without the intervention of a trustee of the legal fee. But in cases where the testator died before the 13th of August, 1859, or where there is a devise, subject to a charge of debts, to a beneficial owner in fee or in tail, or for all other the testator's interest in the estate, the Act leaves this question in the same doubt and perplexity as before. No testator, then, ought to create a charge of debts upon his real estate without at the same time expressly creating a trust or power for giving effect to the charge, and distinctly pointing out the persons by whom the trust or power is to be exercised.

(z) Lewin, 7 ed. 421.

IV. *Assignment of Possibilities and Choses in Action.*

1. It was an ancient and well established principle of common law that no possibility, right, title, nor thing in action could be granted or assigned to strangers (*a*) ; and accordingly, if there was what purported to be an assignment of such interests, the assignee could not sue at law for them in his own name.

Possibilities and choses in action not assignable at law.

The necessities of commerce, however, long ago effected a modification of this principle, even at law. Some choses in action, of which bills of exchange are a type, became assignable by custom ; others have from time to time been expressly made so by statute—for instance, promissory notes, by 3 & 4 Anne, c. 9, 7 Anne, c. 25 ; railway bonds, by 8 & 9 Vict. c. 19 ; endorsed bills of lading, by 18 & 19 Vict. c. 111 ; and, as we have elsewhere observed, policies of life and marine assurance, by 30 & 31 Vict. c. 144, and 31 & 32 Vict. c. 86 (*b*). But in all cases not so provided for, it until recently remained necessary for an assignee suing at law to use the name of the original creditor (*c*).

Exceptions, customary and statutory.

Courts of equity, on the other hand, have been wont from an early period to recognise the validity of the assignment of possibilities and choses in action generally ; and have continually carried such assignments into effect, when made for valuable consideration (*d*).

Assignments recognised in equity.

We are thus led to the consideration of a striking and fundamental contrast of principles between law and equity, which remains of importance, notwithstanding the provisions of the Judicature Act presently quoted.

First, it will be desirable to cite in detail, by way of illustration, some instances of rights which have been deemed assignable in equity, though not so in law.

(*a*) *Lampet's Case*, 10 Co. 47.

(*b*) p. 56.

(*c*) *De Pothonier v. De Mattos*, Ell.

Bl. & Ell. 467.

(*d*) *Anon.*, Freem. 145 ; *Squib v.*

Wyn, 1 P. Wms. 381.

Of these there are two principal classes, the first comprising possibilities; the second, debts of various kinds.

Possibilities.

(1.) In respect of the former, one of the leading authorities is the case of

WARMSTREY v. TANFIELD.

[1 Ch. Rep. 29; 2 W. & T. L. C. 724.]

There, one William Freeman, being possessed of the third part of a parsonage for the whole term to come, granted all his interest therein to one Alborough, in trust for the use of the said Freeman and his wife during their lives, and after to the use of such issue male of their bodies as the said Freeman should by will appoint. Freeman appointed the premises after the death of his wife to his son Richard, who during the life of his mother assigned the premises to the plaintiff. The defendant claimed under a lease made by the said Richard Freeman two years after the said assignment.

It was held that though the assignment was of a mere possibility (being dependent on Richard's surviving his mother), and therefore not good in law, yet it was valid in equity, and the plaintiff's claim was allowed, as arising under a deed precedent to that through which the defendant claimed.

Expectancies.

(2.) On grounds analogous to this we find equity enforcing assignments of mere expectancies, such as that of an heir-at-law (*e*), or the next of kin of a living person (*f*), or the interest which a person expects under the will of a living person (*g*), or the share to which a person may become entitled under an appointment (*h*).

Non-existent property

(3.) By a somewhat further extension of the same principle, non-existent property, or property to be acquired at a future time, has been held assignable in equity; such as the future cargo of a ship (*i*), future patent rights (*j*), machinery yet to be erected (*k*).

(*e*) *Hobson v. Trevor*, 2 P. Wms. 191.

(*f*) *Hinde v. Blake*, 3 Beav. 235.

(*g*) *Beckley v. Newland*, 2 P. Wms. 182.

(*h*) *Musprat v. Gordon*, 1 Anst. 34.

(*i*) *Lindsay v. Gibbs*, 22 Beav. 522.

(*j*) *Printing &c. Co. v. Sampson*, 19 Eq. 462.

(*k*) *Holroyd v. Marshall*, 10 H. L. 191.

(4.) The jurisdiction of the Courts of law was extended by 8 & 9 Vict. c. 106, by s. 6 of which it was enacted that thereafter contingent, executory and future interests and possibilities, *coupled with an interest in real estate*, might be assigned at law by deed. But this Act left untouched assignments of contingent interests in chattels, and mere naked possibilities not coupled with an interest. As to such, therefore, equity alone continued to recognise the validity of assignments.

(5.) One of the principal authorities on the assignment of debts is Choses in action.

ROW v. DAWSON.

[1 Ves. sr. 331 ; 2 W. & T. L. C. 726.]

In this case Tonson and Conway lent money to Gibson, who gave them a draft in the following terms: "Out of the money due to me from Horace Walpole out of the Exchequer, and what will be due at Michaelmas, pay to Tonson and Conway; value received." Gibson having become bankrupt, the question was whether this draft created a specific lien upon the sum due to his estate.

Lord Hardwicke distinguished between this draft and a bill of exchange, the draft being not to pay generally, but out of a particular fund, and creating no personal demand; and he held that there being an agreement for valuable consideration beforehand to lend money on the faith of being satisfied out of the fund, the draft was a credit on the fund, and amounted to an assignment of so much of the debt; and that though the law did not admit an assignment of a chose in action, equity did, and that any words would do, no particular form being necessary thereto.

The first question which arises in cases of this nature is as to what does and what does not amount to a valid equitable assignment.

The above case establishes the principle that any words which show an intention to appropriate the chose in action No particular

form
required.

to the assignee, are, if supported by valuable consideration, sufficient to effect a valid assignment. In other words, an agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor (*l*), or an order given by a debtor to his creditor upon a third person, who has funds of the debtor, to pay the creditor out of such funds (*m*), will effect a complete assignment in equity of so much money. See also *Diplock v. Hammond* (*n*), *Lett v. Morris* (*o*). Writing, even, is not necessary, if there is clear proof of an oral charge (*p*).

Intention
must be
clear.

The intention to create a charge must, however, be clear. A promise to pay when the debtor receives a debt due to him from a third person is not sufficient (*q*), nor is a statement that the arrival of a certain cargo would put him in funds (*r*); nor is a cheque or bill of exchange an equitable assignment of the drawer's balance at his bank (*s*).

Assign-
ment
complete
only on
communi-
cation to
creditor.

Again, an equitable assignment is not complete until it is communicated to the creditor. Thus a mere mandate from a principal to his agent to pay a debt out of a certain fund gives the creditor no specific charge on that fund (*t*). Until such mandate is communicated to the creditor, and assented to by him, it may be revoked (*u*). But after such communication the agent becomes the debtor of the assignee, and the order cannot then be countermanded (*v*).

Must be
addressed
to debtor.

On the other hand, a mere power of attorney, or authority to a person to receive money, not addressed to the debtor, does not amount to an equitable assignment (*x*).

(*l*) *Rodick v. Gandell*, 1 De G. M. & G. 763, 776.

(*m*) *Burn v. Carvalho*, 4 My. & Cr. 702.

(*n*) 2 Sm. & G. 141; 5 De G. M. & G. 320.

(*o*) 4 Sim. 607.

(*p*) *Gurnell v. Gardner*, 7 Jur. N. S. 1220.

(*q*) *Field v. Megaw*, 4 L. R. C. P. 660.

(*r*) *Jones v. Starkey*, 16 Jur. 510.

(*s*) *Hopkinson v. Forster*, 19 Eq. 74; *Shand v. Du Buisson*, 18 Eq. 283.

(*t*) *Morell v. Wooten*, 16 Beav. 197.

(*u*) *Scott v. Porcher*, 3 Mer. 652.

(*v*) *Fitzgerald v. Stewart*, 2 R. & M. 457.

(*x*) *Rodick v. Gandell*, *sup.*; *Bell v. L. & N. W. R.*, 15 Beav. 548.

2. Notice, how far required.

Notice not
needed as
between
assignor
and
assignee.

(1.) An equitable assignment is complete as between assignor and assignee, though no notice thereof is given to the depositary or holder of the fund (*y*); nor is notice necessary as against a person standing in the same position as the assignor, such as a judgment creditor (*z*), or a creditor under a garnishee order (*a*). Such a creditor will therefore be postponed to an equitable assignee, notwithstanding that he may have, after the assignment, but before notice to the depositary, obtained an order charging the fund (*b*).

(2.) But to complete the security of the assignee, it is for many purposes necessary for him promptly to give notice of the assignment to the holder of the fund.

But is
required to
complete
security;

First, in the absence of such notice the holder of the fund may effectually discharge himself by paying the assignor, and if he does so the charge of the assignee will, of course, be lost (*c*).

otherwise
debtor
may safely
pay
assignor,

Secondly, if the assignor make a subsequent assignment of the debt, and the second assignee gives notice before the first does so, the second thereby gains priority (*d*), whether the interest of the assignor be present or future, vested or contingent. The principle is the same as that which requires the assignee of a personal chattel to take every step in his power to reduce it into possession, and in case of his neglect postpones him to a subsequent assignee for value, who takes without notice. Of the two parties one must suffer; and equity will not assist the one prior in time if by his negligence the possessor has been enabled to deceive the second assignee. If, however, the former has done all he could to secure possession, he will not lose his priority (*e*). If the notices of the assignments are

or sub-
sequent
incum-
brancer
may gain
priority.

(*y*) *Jones v. Gibbons*, 9 Ves. 410 ;
Cook v. Black, 1 Ha. 390.

(*z*) *Beavan v. Ld. Oxford*, 6 De G.
M. & G. 492.

(*a*) *Pickering v. I. R. Co.*, 3 L. R.
C. P. 235.

(*b*) *Scott v. Ld. Hastings*, 4 K. &

J. 633.

(*c*) *Norrish v. Marshall*, 5 Madd.
475.

(*d*) *Dearle v. Hall, Loveridge v.*
Cooper, 3 Russ. 1, 30, 48.

(*e*) *Feltham v. Clark*, 1 De G. &
Sm. 307.

simultaneous they will take priority according to their dates(*f*).

Reputed
ownership
in bank-
ruptcy.

Again, notice is often requisite to protect an assignee against the effect of the reputed ownership clause of the Bankruptcy Act. Under the present Act (*g*) all goods and chattels being at the commencement of the bankruptcy in the possession, order or disposition of the bankrupt, *being a trader*, by the consent and permission of the true owner, of which goods and chattels the bankrupt is reputed owner, or of which he has taken upon himself the sale or disposition as owner, are treated as the property of the bankrupt divisible among his creditors; and debts due to him in the course of his trade or business are deemed goods and chattels (*h*).

An assignee of chattels is only protected against this clause by taking every step he can to secure possession. Similarly, an assignee of a chose in action is only secured by giving notice to the debtor of the assignment. Such was the decision in the leading case of

RYALL v. ROWLES

[1 Ves. sr. 348; 2 W. & T. L. C. 729],

which is still applicable, *mutatis mutandis*, to cases under the present Bankruptcy Act; and the principle thereof has been held to extend to a bankrupt's reversionary interest not falling into possession till after his bankruptcy (*i*).

It has been held that it is sufficient protection for the assignee if he gives notice between the act of bankruptcy and the petition for adjudication, *bonâ fide* dealings with the bankrupt during that time being especially protected (*k*).

Equitable
interests in
land dis-
tinguished.

The distinction must be observed between such cases as these, in which priority is determined by the time of notice, and the case of equitable interests in land, priority as to

(*f*) *Calisher v. Forbes*, 7 Ch. 109. 127.

(*g*) 32 & 33 Vict. c. 71.

(*h*) s. 15, (5).

(*i*) *Bartlett v. B.*, 1 De G. & J.

(*k*) s. 94, (3). *Re Styron*, 1 Ph. 105;
2 M. D. & De G. 219.

which is fixed by the order in time of the incumbrances, and is not affected by notice (*l*).

For the reasons above given an assignee of a chose in action should always promptly give written notice of the assignment to the trustees or debtor in whose hands the fund is, since by this means alone can he secure a right *in rem* to the subject-matter of the assignment. If new trustees of the fund are appointed, notice must again be given to them, as they are not affected by notice to their predecessors (*m*). The assignee can completely protect his security from the danger thus arising, only by having his deed indorsed on the original deed, or by obtaining a *distringas* upon the funds, or a transfer of them into Court (*n*). If the fund is already in Court the assignee should at once obtain a stop order, or he is liable to be postponed to a subsequent assignee who takes this step before him (*o*). This has just the same effect as notice to a trustee while the fund is in his hands, and if the fund is paid in after such notice, it is secure, even without a stop order (*p*).

3. The assignee of a chose in action, whether it be a debt or a trust fund, generally takes it subject to all equities which affect it as against the assignor. Thus a bond void as against the assignor does not become valid in the hands of an assignee (*q*); if the assigned debt is subject to a set off by the debtor the assignee is liable to the set off (*r*); if the debt is payment only on condition, the condition is binding on the assignee (*s*); and generally, the assignee takes subject to the state of accounts between the assignor and the debtor (*t*). Similarly, an assignee of a legacy or

(*l*) *Jones v. J.*, 8 Sim. 633; *Wiltshire v. Rabbits*, 14 Sim. 76.

(*m*) *Phipps v. Lovegrove*, 16 Eq. 80.

(*n*) *Ibid.*

(*o*) *Greening v. Beckford*, 5 Sim. 195; *Swayne v. S.*, 11 Beav. 463.

(*p*) *Livesey v. Harding*, 23 Beav. 141; *Thompson v. Tomkins*, 2 Dr. &

Sm. 8.

(*q*) *Turton v. Benson*, 1 P. Wms. 496.

(*r*) *Exp. Mackenzie*, 7 Eq. 240; *Cavendish v. Greaves*, 24 Beav. 163 173.

(*s*) *Tooth v. Hallett*, 4 Ch. 242.

(*t*) *Ord v. White*, 3 Beav. 357; *Rolt v. White*, 31 *ib.* 520.

Distringas.

Transfer into Court; stop order.

Assignee takes subject to equities;

residue, though for value and without notice, takes subject to the testator's debts (*u*).

except in
case of
negotiable
instru-
ments,

There are, however, two classes of exceptions to this rule. First, as to negotiable instruments, such as bills of exchange, which, on grounds of commercial convenience or necessity, carry with them a title free from any equities or cross-claims as between the parties thereto (*x*). On similar grounds, indorsed bills of lading (*y*) and debentures payable to bearer (*z*) have been similarly treated. Bills of exchange indorsed when overdue are not, however, within the exception (*a*).

or of
laches.

Secondly, equities affecting the chose in action may be lost by the release, either express or implied, of the person entitled thereto (*b*); or by his neglect to enforce them against the assignee. Enjoyment undisturbed for a considerable lapse of time always tends to strengthen the position of the assignee (*c*).

Jud. Act,
s. 25,
sub-s. 6.

4. The law as to the assignment of choses in action has recently been placed on a different footing by the Judicature Act, 1873. It is thereby enacted (*d*) that "Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and shall be deemed to have been, effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if the Act had not passed) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and a power to

(*u*) *Hooper v. Smart*, 1 Ch. D. 90.

(*x*) *Exp. City Bank*, 3 Ch. 758.

(*y*) *Chartered Bank &c. v. Henderson*, 5 L. R. P. C. 501.

(*z*) *In re Blakely Ordnance Co.*, 3 Ch. 154.

(*a*) *Holmes v. Kidd*, 3 H. & N. 891.

(*b*) *In re Northern Assam Tea Co.*, 10 Eq. 458; *In re Agra &c. Bank*, 2 Ch. 391.

(*c*) *Hill v. Caillouel*, 1 Ves. sr. 122; *Exp. Chorley*, 11 Eq. 157.

(*d*) 36 & 37 Vict. c. 66, s. 25, sub-s. 6.

give a good discharge for the same without the concurrence of the assignor."

It is only necessary with respect to this to observe Effect of that—

(1.) It applies only to absolute assignments. Mortgages, therefore, of debts remain on the same footing as before the Act, and the assignee of a debt by way of charge cannot sue at law (*e*).

(2.) It applies only to legal choses in action. Equitable choses in action, whether absolute or by way of charge, are unaffected by this section, and if assigned can be sued for in all Courts, the assignor and assignee being before the Court.

(3.) Express notice in writing of the assignment must have been given by the assignor. Previous, however, to this Act an oral assignment of a legal chose in action was valid in equity, and will now, it seems, be regarded as valid in all Courts, the mode of transfer under the Act not being compulsory (*f*).

5. This is a convenient place in which to comment on certain assignments similar to those just now considered, but which are on grounds of public policy deemed void both at law and in equity. Illegal assignments.

(1.) Pensions and salaries payable to public officers are considered as given for maintaining the dignity of their offices, and for securing the proper discharge of the duties thereof. Effect will not, therefore, be given to an attempted assignment of such pensions or salaries. Within this principle fall the pay of a military officer (*g*), of a clerk of the peace (*h*), of a judge (*i*), and in fact the emoluments of any public office (*k*). Pensions, &c.

(*e*) *National Prov. Bank v. Harle*, 6 Q. B. D. 626.

(*f*) *Coote Mortgages*, 499.

(*g*) *Stone v. Lidderdale*, 2 Anstr. 533.

(*h*) *Palmer v. Bate*, 6 Moo. 28 ; 2 Br. & B. 673.

(*i*) *Arbuthnot v. Norton*, 5 Moo. P. C. 219.

(*k*) See 46 Geo. III. c. 69, s. 7 ;

47 Geo. III. sess. 2, c. 25, s. 4 ;

Davis v. D. of Marlborough, 1 Swanst. 74.

What pensions are assignable.

Where, however, no particular service is to be rendered to the public, an assignment of an interest or pension is valid. Thus prize money was held assignable (*l*); so also the pension of a County Court Judge for past services (*m*), and civil service pensions generally (*n*).

Cham-perty and maintenance.

(2.) Public policy, again, is opposed to assignments which partake of the nature of champerty or maintenance—that is, the buying of disputed or pretended titles.

Thus an assignment of a share of prize money, the subject of a then depending suit in the Admiralty Court, in consideration of the assignee paying the costs of the suit, was held void (*o*); the assignment of a bare right to file a bill in equity was similarly treated (*p*).

Purchase *pendente lite*, when admissible.

But in certain cases a purchase or mortgage of an interest *pendente lite*, or an advance of money for carrying on a suit, is admissible. It is so if the parties have a common interest (*q*), or if there exists between them the relation of father and son (*r*), ancestor and heir (*s*), or master and servant (*t*). The purchase *pendente lite* of the subject matter of a suit by an attorney is, however, always invalid (*u*), unless at least it be by way of security for payment of his costs (*x*); and the law in this respect is unaffected by 33 & 34 Vict. c. 28, which enables attorneys and solicitors in certain cases to make agreements with their clients as to remuneration in lieu of costs (*y*).

The strict rule as to champerty seems to have been sometimes relaxed in special circumstances; for instance, the assignment of a legacy by a person too poor to sue for

(*l*) *Alexander v. D. of Wellington*, 2 R. & M. 35.

(*m*) *Willcock v. Terrell*, 3 Ex. D. 323.

(*n*) *Sanson v. S.*, 4 P. D. 69.

(*o*) *Stevens v. Bagwell*, 15 Ves. 139.

(*p*) *Prosser v. Edmonds*, 1 Y. & C. Ex. 481; *Powell v. Knowles*, 2 Atk. 226; *Hill v. Boyle*, 4 Eq. 260, 263; *In re Paris Skating Rink Co.*, 5 Ch. D. 959.

(*q*) *Hunter v. Daniel*, 4 Ha. 420.

(*r*) *Burke v. Greene*, 2 Ba. & B. 521.

(*s*) *Moore v. Fisher*, 7 Sim. 384.

(*t*) *Wallis v. D. of Portland*, 3 Ves. 503.

(*u*) *Simpson v. Lamb*, 7 E. & B. 84.

(*x*) *Anderson v. Radcliffe*, 6 Jur N. S. 578.

(*y*) *In re Att. & Sol. Act*, 1870, 1 Ch. D. 573.

it, to another, who sought to enforce payment by suit, was upheld (z). And it is to be observed that a person who has originally a good title to sue will not lose it by entering into a bargain tainted with champerty (a).

(z) *Tyson v. Jackson*, 30 Beav. 384. (a) *Hilton v. Woods*, 4 Eq. 432.

CHAPTER VI.

SURETYSHIP.

- I. *Contrast between Legal and Equitable Doctrines.*
- II. *General Principles of Equity as to Suretyship.*
 - 1. *In the formation of the Contract.*
 - 2. *As to subsequent departure from the Terms.*
Rees v. Berrington.
- III. *Releases and Compositions.*
 - 1. *As to Debtor.*
 - 2. *As to Sureties.*
- IV. *Continuing Suretyship or Guarantee.*
- V. *Contribution between Co-sureties.*
Dering v. E. of Winchelsea.
- VI. *Right of Surety to Securities.*
- VII. *Rights of Sureties in Bankruptcy.*

I. *Contrast between Legal and Equitable Doctrines.*

THE distinctions which formerly existed between the principles of common law and those of equity respecting suretyship, may be concisely summarised under the following headings:—

Proof of
suretyship
when not
apparent
on the face
of the
instru-
ment.

- 1. Where it did not appear on the face of the instrument creating the suretyship that a person was surety—if, for instance, in a bond the principal debtor and surety were bound jointly and severally—the surety could not, *at law*, aver by pleading that he was bound only as a surety, nor

was parol evidence admissible to prove it (*a*). But in equity, although they both appeared as principals, parol evidence was always admissible to show that one was only a surety (*b*). The consequence was that upon the creditor giving further time to the principal debtor, knowing him to be such, the surety, upon proving that fact, might have relief in equity, although at law, where he appeared only as principal, he would formerly have been held bound (*c*). When equitable pleas became available at common law this distinction disappeared (*d*).

2. In general an obligation created by an instrument could at law only be dissolved by one of equal force. Thus, time given by a mere parol agreement, although for valuable consideration, would not at law have discharged a surety whose obligation arose from an instrument under seal (*e*), or by matter of record, such as a recognisance (*f*). In equity, however, this rule of law was disregarded; and as what is agreed to be done is looked upon as done, relief is in such cases given (*g*). Conversely, by the operation of the same rule, a principal creditor might have been held at law to have released a surety, where in equity the surety would still be considered liable—for instance, where the creditor had by deed, with the parol consent only of the surety, released the principal debtor (*h*).

3. The general principle of contribution between sureties at law originally rested on the ground only of an express contract between the parties. Subsequently jurisdiction was assumed to compel contribution in the absence of positive contract, on the ground of implied *assumpsit*. But though this assumption approached the equitable principle of dealing with such cases, since it was held that separate actions might be brought against the sureties

Release of sureties under deeds.

Conversely, surety continuing liable after release.

Principles of contribution at law.

(*a*) *Lewis v. Jones*, 4 B. & C. 506.

(*b*) *Clarke v. Henty*, 3 Y. & C. Ex. 187.

(*c*) *Craythorne v. Swinburne*, 14 Ves. 160, 170.

(*d*) *Pooley v. Harradine*, 7 E. & B. 431.

(*e*) *Davey v. Prendergrass*, 5 B. & Ald. 187.

(*f*) *Bulteel v. Jarrold*, 8 Price, 467.

(*g*) *Bowmaker v. Moore*, 3 Price, 214.

(*h*) *Brooks v. Stuart*, 1 Beav. 512.

for their respective quotas and proportions, there was great inconvenience in working out the legal remedy where the sureties were numerous. Hence the equitable relief by bill for contribution remained the best mode which could be resorted to.

Insolvency
of one of
more
sureties;

4. Where there were several sureties, and one became insolvent, a surety who paid the entire debt could at law have recovered only an aliquot part of the whole, calculated according to the original number of the co-sureties (*i*). In equity he can compel the remaining sureties to contribute equally with himself (*k*). Thus if there were three sureties, one of whom became insolvent, and one of the remaining two paid the entire debt, at law he could only recover one-third from the remaining solvent surety; in equity he can recover one-half.

or death.

So, also, if one of several co-sureties died, at law an action only lay against the surviving sureties for their proportions; but in equity contribution can be enforced also against the representatives of the deceased surety (*l*).

It was owing to the imperfection of the legal remedy in these and other respects, which will be hereafter noticed, that the jurisdiction of equity in matters of suretyship arose; and being once established, it was not affected by the subsequently extended jurisdiction of the Courts of law. Cases of suretyship, therefore, continue to come chiefly under the cognisance of the Chancery Division of the High Court.

II. *The General Principles of Equity respecting Suretyship.*

1. *As to the original formation of the contract.*

Utmost
good faith
required.

The intimate nature of the relation between the parties to the contract of suretyship requires that the utmost good faith should be adhered to by them. Whenever there is,

(*i*) *Cowell v. Edwards*, 2 B. & P. 271.
268.

(*l*) *Simpson v. Vaughan*, 2 Atk. 31; *Batard v. Hawes*, 2 E. & B. 287.

with the knowledge and assent of the creditor, any misrepresentation to, or concealment from, the surety of material facts, or any undue advantage taken of the surety, as by surprise, the contract will be considered invalid, and the surety discharged from liability.

It is impossible to lay down in general terms any rule by which to determine what degree of concealment or misrepresentation is necessary to annul the obligation of the contract. Equity has always refused to formulate a definition of fraud, lest, having done so, its jurisdiction should be eluded by new schemes of man's ingenuity. Some guidance is, however, afforded by the well authorised statement that "if a party taking a guarantee from a surety conceals from him facts which go to increase his risk, and suffers him to enter into the contract under false impressions as to the real state of facts, such concealment will amount to fraud" (*m*). But it appears that this broad statement is subject to certain limitations, and it has been held that the true criterion as to whether any disclosure ought to be made voluntarily, is to inquire whether there was anything which might not naturally have been expected to have taken place between the parties; that is, whether there was a contract between the debtor and creditor to the effect that his position should be different from that which the surety might naturally expect (*n*).

A surety is entitled to be informed of any private bargain between a vendor and vendee which can in any way increase his responsibility (*o*); and, moreover, if there are any circumstances which afford ground for suspecting that fraud is being practised upon the surety by the debtor, the creditor cannot shelter himself under the plea that he was not called upon to ask, and did not ask, any questions on the subject. In such cases wilful ignorance is

What concealment annuls the obligation.

Private bargains increasing the responsibility. Fraud.

(*m*) Story's Eq. Jur., s. 215.

(*o*) *Pidcock v. Bishop*, 3 B. & C.

(*n*) *Hamilton v. Watson*, 12 Cl. & F. 109.

605.

not to be distinguished in its equitable consequences from knowledge (*q*).

Rules not so strict as in insurance.

It has been decided, however, that the rules as to guarantee are not so strict as those which are applicable to the contract of insurance. A creditor, therefore, is not bound, in the absence of inquiry by the surety, to acquaint him with every circumstance in his knowledge affecting the credit of the debtor, or of any matter unconnected with the transaction which might render it hazardous (*r*).

2. *Effects of subsequent departure from the terms of the contract.*

(1.) Giving time to the debtor.

The case of

REES v. BERRINGTON

[2 Ves. jr. 540; 2 W. & T. L. C. 992]

General rule as to giving time.

is a leading authority for the general proposition that if a creditor, without the assent or knowledge of the surety, agrees to give to the principal debtor a longer time than was specified in the contract to which the surety was party, he thereby loses his claim against the surety (*s*). The cases, however, show that in the application of this principle many circumstances must be considered.

Mere passiveness not sufficient,

Mere passiveness by the creditor—for instance, his not taking proceedings against the debtor—will not, in the absence of a binding stipulation in the contract of suretyship requiring activity and promptness on his part, release the surety. He himself must use diligence (*t*). If there be a stipulation that on default the creditor is to sue without delay, then failure to do so will discharge the surety (*u*). In *Rees v. Berrington* the creditor was not merely passive, but entered into a binding contract to give further time, without the surety's consent. In

unless there is an express stipulation to that effect.

(*q*) *Owen v. Homan*, 4 H. L. 997; *Maitland v. Irving*, 15 Sim. 437.

(*r*) *N. B. Insce. Co. v. Lloyd*, 10 Exch. 523; *Lee v. Jones*, 14 C. B. N. S. 386; 17 *ib.* 482.

(*s*) See also *Nisbet v. Smith*, 2 Bro. C. C. 579.

(*t*) *Eyre v. Everett*, 2 Russ. 381.

(*u*) *B. of Ireland v. Beresford*, 6 Dow. 233.

such a case it is immaterial that the delay is given in consequence of the debtor's inability to pay, or that no injury could thereby accrue to the surety. The surety is not required to prove damage. If there is a default he is entitled to be consulted as to what steps shall be taken (x).

Surety need not prove damage.

A surety will not be discharged if time is given to the principal debtor with his consent or subsequent approval (y); and a subsequent promise to pay the debt will revive a liability which might otherwise have been discharged (z).

Time given with surety's consent.

An agreement with the debtor to give him further time will not discharge the surety unless it is binding upon the creditor. A mere voluntary promise, not acted upon, and which cannot be enforced, will not have that effect (a). Nor will an agreement which is conditional upon the performance of an act which in the event the debtor does not perform (b).

The agreement to give time must bind the creditor.

A surety will not be discharged by the creditor giving time, if the remedies of the surety are not diminished or affected, *a fortiori* if they are accelerated (c).

Surety's rights must be affected.

It seems that when a creditor has obtained a decree against the surety, no subsequent dealings giving time to the debtor will have the effect of releasing the surety. His liability in fact no longer rests on his suretyship, but on the decree (d).

Surety not released by dealings after decree;

Nor will the surety be discharged if the creditor, on giving further time to the principal debtor, reserves his right to proceed against the surety; and it is immaterial whether the surety is informed of the arrangement or not. The reason is, that when the right is reserved, the principal debtor cannot say that it is inconsistent with giving him

nor if the rights against the surety are reserved.

(x) *Samuel v. Howarth*, 3 Mer. 272; *Latham v. Chartered Bank of India*, 17 Eq. 205.

(y) *Tyson v. Cox*, T. & R. 395; *Duffy v. Orr*, 5 Bli. N.S. 620.

(z) *Mayhew v. Crickett*, 2 Swanst. 185, 192.

(a) *Philpot v. Briant*, 4 Bing. 717; *Tucker v. Laing*, 2 K. & J. 745.

(b) *Badnal v. Samuel*, 3 Price, 521.

(c) *Hulme v. Coles*, 2 Sim. 12, where a creditor took a *cognovit* in an action brought against the creditor with stay of execution until a day earlier than that on which judgment could have been obtained in the regular course.

(d) *Jenkins v. Robertson*, 2 Drew, 351.

time that the creditor should be at liberty to proceed against the sureties, and that they should turn round upon the principal debtor, notwithstanding the time so given him; for he was a party to the arrangement by which that right was reserved to the creditor (*e*). It is evident that in such a case, notwithstanding the time given to the principal debtor by the creditor, if the creditor at once proceeds against the surety, the surety may forthwith proceed in his turn against the debtor, and so the benefit of the extended time may not in effect be realised by him; but of this he cannot complain. The right of the surety against the principal debtor can only be lost by the surety's contract to abandon it (*f*). It seems that parol evidence is admissible to prove the reservation of right against the surety (*g*), unless the time is given by deed, in which case the reservation should appear thereon (*h*).

Divisible
contract.

Where a contract is divisible—as, for instance, where successive payments are to be made at fixed periods—if the creditor contracts to give time as to one of such payments, he will release the surety as to that payment only, not as to subsequent payments (*i*).

Giving
time to the
surety.

(2.) Under this heading may be conveniently mentioned the analogous case in which the holder of a security agrees with the principal debtor to give time to the *surety*. It has been held that to do so effects the discharge of the surety (*k*). It was considered that this was a stronger case than an agreement to give time to the principal, which only implies an agreement not to sue the surety; but an express agreement not to sue the surety prevents the creditor from doing that which would throw the surety upon the principal.

(3.) Other variations in the contract.

De-
partures

Where there is in the contract between the principal

(*e*) *Webb v. Hewitt*, 3 K. & J. 442; *Boulton v. Stubbbs*, 18 Ves. 20.

(*f*) *Close v. C.*, 4 De G. M. & G. 176.

(*g*) *Wyke v. Rogers*, 1 De G. M. & G. 408.

(*h*) *Exp. Glendinning*, Buck. 517.

(*i*) *Croydon Gas Co. v. Dickinson*, 2 C. P. D. 46.

(*k*) *Oriental &c. Corp. v. Overend, Gurney & Co.*, 7 Ch. 142.

debtor and the creditor a departure from that which the surety stipulated for and contemplated when he entered into the obligation, the surety will, as a general rule, be released (*l*). from the contract generally release sureties.

Thus where a person had agreed to become surety for another in a joint and several bond to A. and B. upon having a counter-bond from A. and C. to indemnify him, and the first bond was executed by the surety only, A. and B. having neglected to procure the signature of the principal, it was held that the surety was not bound, though he received the bond of indemnity from A. and C. The surety had a material interest in the extent of the rights and remedies of the creditor against the principal debtor; and these being different from what he contemplated and contracted for, there was no claim against him (*m*). But if in such circumstances the principal debtor had executed some other instrument on which the surety might sue him and become his specialty creditor, he would have remained bound (*n*). Illustrations.

So where a surety executed a deed prepared by the creditor which appeared to contain a joint and several covenant by two co-sureties, but no other signature was provided by the creditor as co-surety, the surety who signed was discharged (*o*).

Where a person gave a promissory note as surety, upon an agreement that the amount should be advanced to the principal debtor by draft at three months, and the creditor, without the concurrence of the surety, paid the amount at once, the surety was discharged, on the ground of the variation of the agreement (*p*). Where persons agreed to become sureties for a contractor who was undertaking certain works, and the contract was that three-fourths of the work, as finished, should be paid for periodically, and the remainder upon completion, payments having been

(*l*) *Bonser v. Cox*, 4 Beav. 379 ;
6 *ib.* 110.

(*m*) *Ibid.* *Calvert v. London Dock Co.*, 2 Keen, 638.

(*n*) *Cooper v. Evans*, 4 Eq. 45.

(*o*) *Evans v. Bremridge*, 2 K. & J. 174 ; 8 De G. M. & G. 101.

(*p*) *Bonser v. Cox*, 6, *sup.*

made exceeding three-fourths of the work done, the sureties were released (*q*).

Where, as in *Dering v. E. of Winchelsea* (*r*), there is a bond of suretyship for the fidelity of an officer, and the nature of the office or its duties are materially changed so as to affect the peril of the sureties, the bond will be avoided (*s*). It is necessary, however, that the alteration should be such as to materially affect the surety (*t*). It may also be that the wording of the bond is extensive enough to continue the liability notwithstanding a material change (*u*).

Where a creditor takes a second security in satisfaction of the first, the surety is discharged (*x*). But the taking of an additional security not in lieu of the former one has no such effect (*y*).

III. *The Effects of Releases and Compositions.*

Release or composition discharges surety, unless surety concurs or the contrary is stipulated, or surety has already partially paid the debt,

1. *Release of, or composition with, the debtor.*

Where a creditor releases, or compounds with the principal debtor, without the concurrence of the surety, and although it may be done by mistake or for the benefit of the surety, he will thereby discharge the surety unless there is a stipulation to the contrary (*z*). It would be a manifest fraud on the debtor to profess to release him, and then to sue the surety, who could forthwith sue the debtor (*a*). If, however, the surety has, previously to the release given to the debtor, paid part of the debt and given security for the remainder, the general rule will not

(*q*) *Calvert v. London Docks Co.*, 2 Keen, 638; *Exp. Rushforth*, 10 Ves. 409.

(*r*) 1 Cox, 318.

(*s*) *Bonar v. Macdonald*, 3 H. L. 226.

(*t*) *Sanderson v. Aston*, 8 Eq. L. R. Ex. 73; *Skillett v. Fletcher*, 1 L. R. C. P. 217.

(*u*) *Oswald v. M. of Berwick*, 5

H. L. 856.

(*x*) *Clarke v. Henty*, 3 Y. & C. Ex. 187.

(*y*) *Gordon v. Calvert*, 4 Russ. 581.

(*z*) *Exp. Smith*, 3 Bro. C. C. 1; *Davidson v. MacGregor*, 8 M. & W. 755; *Cragoe v. Jones*, 8 L. R. Ex. 81.

(*a*) *Nevill's Case*, 6 Ch. 47.

apply. The liability of the surety will then rest on the security given, rather than on the original contract, and will remain in force (*b*).

A surety may, by further contract with the creditor, convert himself, in relation to the debt for which he was surety, into a principal debtor; and then, upon a release being given to the party who was in the first instance the principal, he will lose the benefit of the doctrine that the release of the principal releases the surety (*c*).

A creditor, if he has given an absolute legal or equitable release for a debt, cannot reserve his right to proceed against the sureties (*d*). Where, however, a release can be construed as a covenant not to sue, a reservation of remedies against the surety is admissible. The covenant operates only as far as the rights of the surety are not affected; and since the surety remains liable, he retains his remedies over against the principal debtor (*e*).

A surety is not discharged by the creditor's signing the certificate of a bankrupt debtor after proving his debt, although the surety may have given him notice not to sign it (*f*). And so, when a principal debtor is discharged by a resolution to which the creditors are parties, in liquidation proceedings under sect. 125 of the Bankruptcy Act, 1869, the surety remains liable, though the resolution contains no reservation of rights against sureties. In this case, as in an ordinary bankruptcy, the surety might have paid the debt and proved under the liquidation (*g*). The same rule seems to apply in the case of compositions under sect. 126 of the same Act (*h*). Such compositions are quite distinct from compositions under a deed of agreement such as have been already referred to.

(*b*) *Hall v. Hutchons*, 3 My. & K. 426.

(*c*) *Read v. Lowndes*, 23 Beav. 361.

(*d*) *Nicholson v. Revill*, 4 Ad. & E. 675; *Webb v. Hewitt*, 3 K. & J. 438.

(*e*) *Bateson v. Gosling*, 7 L. R. C. P. 9; *Bailey v. Edwards*, 4 B. & S.

774; *Green v. Wynn*, 4 Ch. 204.

(*f*) *Browne v. Carr*, 7 Bing. 508, 514.

(*g*) *Ellis v. Wilmot*, 10 L. R. Ex. 10, 15.

(*h*) *Megrath v. Gray*, 9 L. R. C. P. 216; *Exp Jacobs*, 10 Ch. 211.

or surety has converted himself into the principal debtor.

Right against surety cannot be reserved after absolute release. Secus in case of a covenant not to sue.

Surety not released by signature of bankrupt's certificate.

So in compositions under the Bankruptcy Act.

2. *Release of, or composition with, one of two or more co-sureties.*

Release of
one surety
discharges
others;

It is a settled principle that the release or discharge of one surety by a creditor operates as a discharge of the others, and this notwithstanding that it arises from a mistake of law (*i*).

not so
composi-
tion;

It has, however, been held in equity that a mere composition with one of the sureties would not have that effect, and that at the same time the remedy against the co-surety might be expressly reserved (*k*). In such cases the co-surety is not damnified; for the creditor, by giving a discharge to one surety for the proportion which he was liable to contribute towards payment of the debt, has no right to proceed against the other sureties for more than their proportion of it (*l*).

nor a
covenant
not to sue.

And if the release can be construed as a mere covenant not to sue, it will not operate as a discharge of the co-sureties (*m*).

IV. *Continuing Suretyship or Guarantee.*

Cases in which the suretyship is not for a definite debt, but for a possible but uncertain liability, such as for discounting bills, or for the due performance of certain duties, give rise to special questions, especially with regard to revocation.

Guarantee
not re-
voked by
death,
but usually
revocable
before

Such contracts are not necessarily revoked by the death of the surety (*n*), but are usually revocable at any time before a liability has been incurred in respect thereof (*o*); and have been treated in equity as revoked when it was the duty of the representatives of the guarantor, with the

(*i*) *Cheetham v. Ward*, 1 B. & P. 633; *Nicholson v. Revill*, 4 A. & E. 675.

(*k*) *Exp. Gifford*, 6 Ves. 805.

(*l*) *Stirling v. Forrester*, 3 Bligh. 591.

(*m*) *Price v. Barker*, 4 E. & B. 760; *Thompson v. Luck*, 3 C. B.

540, 552.

(*n*) *Bradbury v. Morgan*, 1 H. & C. 249; *Lloyd's v. Harper*, 16 Ch. D. 290.

(*o*) *Offord v. Davies*, 12 C. B. N. S. 748. But see 31 Law Journ. Exch. 462.

knowledge of the creditors to whom the guarantee was given, to have given notice to determine the same (*p*). liability incurred.

A person, however, who by a continuing guarantee becomes surety for the honesty of a servant, cannot ordinarily, during the continuance of the service, discharge himself by merely giving notice that he will be no longer liable (*q*). Secus guarantee for honesty of servant. But if the guarantor discovers acts of dishonesty in the person for whom he has made himself answerable, he can at once revoke his guarantee (*r*).

Where a master, who has in his employ a servant whose conduct has been guaranteed, discovers that the servant has been guilty of dishonesty, but nevertheless without the knowledge or consent, express or implied, of the guarantor, continues such servant in his employ, he cannot claim anything from the guarantor in respect of subsequent acts of dishonesty (*s*). But it seems that if in such a case the person suing the guarantor is not in a position which gives him power to dismiss the employée, the guarantee remains in force (*t*). Master may lose benefit of guarantee by concealment.

V. Contribution between Co-sureties.

In the important case of

DERING v. THE EARL OF WINCHELSEA

[1 Cox, 318; 1 W. & T. L. C. 106]

it was laid down that the right of contribution between co-sureties depended on the general principles of equity, and not on the form or nature of the contract between the parties. In that case, Thomas Dering, having been appointed collector of Customs duties, entered into bonds to the Crown with three sureties for the due performance of his office. His brother, Sir Edward Dering, together Principle of contribution in equity.

(*p*) *Harriss v. Fawcett*, 8 Ch. 866.

(*q*) *Calvert v. Gordon*, 7 B. & C. 809; *Gordon v. Calvert*, 4 Russ. 581.

(*r*) *Burgess v. Eve*, 13 Eq. 457.

(*s*) *Phillips v. Foxhall*, 7 L. R. Q. B. 666.

(*t*) *Lawder v. L.*, 7 I. R. C. L. 57

with the Earl of Winchelsea and Sir John Rous, became sureties for him accordingly. Thomas Dering and Sir E. Dering executed one joint and several bond in a penalty of £4000, Thomas Dering and the Earl of Winchelsea executed another similar bond, and Thomas Dering and Sir John Rous a third; all conditioned alike upon the due performance by Thomas Dering of his duty as collector. Thomas Dering being in arrear to the Crown to the amount of £3883 14s. 0d., the Crown put the first bond in suit against Sir E. Dering, and obtained judgment thereon for that sum. Thereupon Sir E. Dering filed this bill against the Earl of Winchelsea and Sir John Rous, claiming from them contribution towards the sum so recovered against him. It was held by Lord Chief Baron Eyre that there must be equal contribution by the defendants. Notwithstanding that the parties were bound in different instruments, they were co-sureties for the same principal, and in the same engagement, and were bound in conscience to contribute proportionally to the penalties of the bonds. In that case the penalties were equal, but the principle would have been the same if they were bound in different sums, except that contribution in that case could not be required beyond the sum for which they had become bound.

In *Stirling v. Forrester* (u), Lord Redesdale again held that the right and duty of contribution was founded in doctrines of equity; that the principle was the same as in cases of average, and that it would be against equity for a creditor to exact or receive payment from one, and to permit, or by his conduct to cause, the other debtors to be exempt from payment; he was bound, seldom by contract, but always in conscience, as far as he was able, to put the party paying the debt upon the same footing with those who were equally bound. The principle may now, therefore, be considered as firmly established. It seems, even, that the right of a surety to enforce contribution

(u) 3 Bligh. 590.

will not be affected by his ignorance at the time he became surety that there were co-sureties (*x*).

Such transactions as that in *Dering v. E. Winchelsea* must, however, be distinguished from those in which sureties are bound by different instruments for distinct portions of a debt due from a principal. If the suretyship of each is a separate and distinct transaction, the doctrine does not apply, and there will be no right of contribution among the sureties (*y*). A surety is not entitled to call upon his co-surety for contribution until he has paid more than his proportion of the debt due by the creditor, even though the co-surety has not been required to pay anything, unless, indeed, the co-surety has been released by the creditor (*z*).

Principle not applicable where sureties bound by different instruments.

Although the principle of contribution is not founded upon contract, still a person may by contract qualify or take himself out of the reach of the principle: for instance, where three co-sureties agreed among themselves that in case of the failure of the principal debtor to pay they would each contribute his respective part, one of them having paid the debt and another become insolvent, it was held that the remaining one could only be required to contribute one-third, not one half, which, in the absence of such an agreement, would have been his liability (*a*).

Principle may be qualified or excluded by contract.

Similarly a person may contract himself entirely out of the principle, and become a merely collateral surety by limiting his liability to payment in case of the default of the principal and other sureties (*b*).

Parol evidence is admissible to show what the real contract was, so as to avoid the application of the doctrine of contribution (*c*).

Parol evidence admissible.

Sureties who have paid the debt are not only entitled to contribution from the other sureties, but also to the securities.

Sureties entitled to securities.

(*x*) *Craythorne v. Swinburne*, 14 Ves. 160, 163.

(*y*) *Coope v. Tynnam*, 1 T. & R. 426; *Arcedeckne v. Howard*, 20 W. R. 879.

(*z*) *Davies v. Humphreys*, 6 M. &

W. 153; *Exp. Snowden*, 17 Ch. D. 44.

(*a*) *Swain v. Wall*, 1 Ch. Rep. 80.

(*b*) *Craythorne v. Swinburne*, *sup.*

(*c*) *Ibid.*

benefit of any security which any of them may have taken from the principal debtor by way of indemnity (*d*), unless, at least, there was originally a contract for the special indemnity to one of the number (*e*). The principle is the same as that more fully expounded in the next section.

VI. *The Right of Surety to Securities.*

A surety is entitled, on the payment of the debt, to all the securities which the creditor has against the principal debtor, whether given at the time of the contract or subsequently, and whether given with or without the knowledge of the surety or of the principal (*f*).

Loss of securities by creditor discharges surety.

Consequently, if a creditor who has had, or ought to have had, such securities, loses them, or suffers them to get back into the possession of the debtor, or fails through neglect to make them effectual, as by failing to give proper notice, the surety will, to the extent of such security, be discharged (*g*). If the security has become worthless otherwise than by the act or neglect of the creditor, its loss, of course, effects no discharge (*h*).

Surety entitled to all equities against persons claiming under the debtor;

A surety who pays off a debt is entitled not only to all the equities which the creditor could have enforced against the principal debtor, but also to those available against persons claiming under him. Thus where A. mortgaged an estate to C., and B. became A.'s surety for the debt, and afterwards A. mortgaged the estate again to D., who had notice of the first mortgage, the first mortgage being paid off partly by B., he was held to have priority over D. for the amount so paid, notwithstanding that D. got a transfer of the legal estate (*i*).

(*d*) *Swain v. Wall*, 1 Ch. Rep. 81.

(*e*) *Cooper v. Jenkins*, 32 Beav. 337; *Steel v. Dixon*, 17 Ch. D. 825.

(*f*) *Mayhew v. Crickett*, 2 Swanst. 185; *Pearl v. Deacon*, 24 Beav. 186; 1 De G. & J. 461; *Lake v. Brutton*, 18 Beav. 34; 8 De G. M. & G. 440;

Pledge v. Buss, Johns. 663, 668.

(*g*) *Capel v. Butler*, 2 S. & S. 457; *Law v. E. I. Co.*, 4 Ves. 824; *Strange v. Fooks*, 4 Giff. 408.

(*h*) *Hardwick v. Wright*, 35 Beav. 133.

(*i*) *Drew v. Lockett*, 32 Beav. 499.

On the other hand, if a surety discharges an obligation at less than its full amount, he cannot, as against the principal debtor, claim the whole amount, but only what he has actually paid in discharge (j). can only claim what he actually pays.

If a surety obtains from the principal debtor a counter-security for the liability which he has undertaken, he must bring into hotch-pot for the benefit of the co-sureties whatever he receives from that source, even though he consented to be surety only upon the terms of having the security, and the co-sureties were at the time of the contract ignorant of the security having been given (k).

The principle has been applied to almost every kind of security. Where the creditor obtained a judgment against the principal debtor, and the surety paid the debt, it was held that he was entitled to an assignment of the judgment (l). But it was questioned whether such assignment was of any effect, since the payment had been considered to discharge the judgment, and so make it valueless (m). Principle applies to all kinds of securities. Judgments.

Similarly where a debt was secured by a bond, it was one time considered that a surety who paid it was entitled to an assignment of the debt and bond. But in *Copis v. Middleton* (n), and *Hodgson v. Shaw* (o), it was decided that on payment of the debt the bond ceased to exist, and was no longer available as a security. Bonds.

By the Mercantile Law Amendment Act, 1856 (p), however, the law both as to judgments and bonds was established in favour of sureties, it being, by sect. 5 thereof, enacted that a surety who pays off a debt so secured shall be entitled to have assigned to him every judgment, specialty, or security which shall be held by the creditor 19 & 20 Vict. c. 97.

(j) *Reed v. Norris*, 2 My. & Cr. 361, 375. 278; *Hodgson v. Shaw*, 3 My. & K. 183, 191.

(k) *Steel v. Dixon*, *sup.*

(n) 1 T. & R. 229.

(l) *Parsons v. Briddock*, 2 Vern. 608.

(o) *Sup.*

(p) 19 & 20 Vict. c. 97.

(m) *Armitage v. Baldwin*, 5 Beav.

in respect of such debt, whether such judgment, &c., shall or shall not at law be deemed to have been satisfied by the payment of the debt. This Act is applicable to a contract made before it was passed, where payment has been made by a surety since that time (*q*).

A creditor who takes out execution against the debtor is a trustee of it for all parties interested. If, therefore, he withdraws it without the knowledge of the sureties, he thereby discharges them (*r*). So, also, if he loses the benefit of it by neglect (*s*).

Further
advance on
security.

Distinct
securities
for sepa-
rate debts.
Tacking.

Where a creditor advances a further sum upon a security, a surety cannot compel him to assign it, unless he pays off the further sum as well as the sum for which he became surety (*t*). And where separate debts are due upon distinct securities from the principal debtor to the creditor, the latter will not lose his right to tack from the fact that a third party who has become surety for one of the debts has paid off that debt (*u*), unless, at any rate, the mortgagee has been guilty of some concealment or misrepresentation (*v*).

VII. *Rights of Sureties in Bankruptcy.*

Sureties
in bank-
ruptcy.

Under the old bankrupt law, unless a surety had actually paid the creditor before the bankruptcy of the principal debtor, he could not himself prove under the bankruptcy (*x*). But if the surety paid the debt after the creditor had proved against the principal's estate, the creditor, on receiving dividends, was held to be trustee thereof for the surety (*y*); and a surety might compel the creditor to go in and prove the debt under the bank-

(*q*) *In re Cochran's Estate*, 5 Eq.

209.
(*r*) *Mayhew v. Crickett*, 2 Swanst.
185, 190.

(*s*) *Watson v. Allcock*, 1 S. & G.
319; 4 De G. M. & G. 242.

(*t*) *William v. Owen*, 13 Sim.

597.

(*u*) *Farebrother v. Wodehouse*, 23
Beav. 18.

(*v*) *Bowker v. Bull*, 1 Sim. N. S.
29.

(*x*) *Taylor v. Mills*, Cowp. 525.

(*y*) *Exp. Rushforth*, 10 Ves. 409.

ruptcy (z). By various Bankruptcy Acts subsequent to these cases, the surety was enabled to prove in his own right for a debt which he had paid after the bankruptcy. Neither the Act of 1869 nor the general rules made thereunder contain express provision for such proof; but by sect. 78 thereof it is provided that in so far as the rules made thereunder do not extend, the principles, practice, and rules previously in force shall be observed. By sect. 31, also, provision is made for the proof of future and contingent liabilities of the bankrupt, through the making of an estimate of their value at the time of the bankruptcy. By virtue of one or other of these sections, it is submitted that the right of sureties to prove still exists; and it seems to have been assumed in *Breslauer v. Brown* that such was the case (a).

(z) *Ibid.* 414.

(a) 2 C. P. D. 314 ; 3 App. C. 672.

CHAPTER VII.

MARRIED WOMEN.

SECT. I.—SEPARATE ESTATE.

General Comparison of Law and Equity.

Hulme v. Tenant.

- I. *The Creation of Separate Estate.*
- II. *The Characteristics of Separate Estate.*
 - (1.) *Voluntary Dispositions.*
 - (2.) *Involuntary Dispositions.*
 - (3.) *Permissive Dispositions.*
- III. *Restraint on Anticipation.*
- IV. *Statutory Separate Estate.*
Married Women's Property Acts.
- V. *Pin-Money.*
- VI. *Paraphernalia.*

*General Comparison of Law and Equity.*1. *Position of a married woman at common law.*

Husband's
rights in
his wife's
property.
Person-
alty.

(1.) By the common law, a husband on his marriage became entitled absolutely to all his wife's chattels personal in possession. If he reduced her choses in action into possession during the coverture, he similarly became entitled to them; if he survived his wife without having reduced them into possession, he was entitled to recover them as her administrator on taking out administration.

But if he died before his wife without having reduced them into possession, the wife was entitled. He also acquired full power over her legal chattels real, in possession and reversion; but if he died before his wife without having aliened them, they survived to her. He was like-
 Realty.
 wise entitled to receive the rents and profits of the wife's real estate during their joint lives.

Such were the extensive rights with which a husband was by law invested in consideration of the obligation which he incurred by the marriage of maintaining his wife. Yet at the same time the wife had no legal remedy in case of his refusing or neglecting to perform the duties in consideration of which he acquired these rights, nor could she claim any relief in the case of his insolvency or bankruptcy. The property which had been hers, however large, was as much at the mercy of his creditors as of himself.

(2.) On the other hand, the wife could not be sued in
 Wife could not be sued.
 any way, even for necessities. In certain cases her contracts for necessities might bind her husband, but never herself or the property which had been hers. Her separate existence was not contemplated; it was merged by the coverture in that of her husband, and she was no more recognised in Courts of law than a *cestui que trust* or a mortgagor (a).

2. *The position of the married woman in equity.*

Such being the rigid rules of law as to the status of a married woman, it is not surprising that Courts of equity should have found ample ground for interference, and should have established a system of doctrines more consonant with reason and justice.

These doctrines are reducible to two leading principles—first, the recognition by equity of the separate estate of a married woman, with reference to which she is regarded and treated as if she were a *feme sole*; secondly, the prin-

(a) Blackstone, II., 433, 435; *Murray v. Barlee*, 2 My. & K. 220, Coke upon Littleton, 300a, 351b; 222; *In the goods of Harding*, 2 P. & D. 394.
Betts v. Kimpton, 2 B. & Ad. 277;

ciple which requires a husband who receives property in the right of his wife to make a proper settlement thereout on his wife and children. The doctrines respecting separate estate form the subject of the present section.

Equity differing therein from the ancient common law, considers a married woman capable of owning property, whether real or personal, in possession or reversion, to her own use independently of her husband, and holds her entitled to enjoy such property with all its privileges and incidents, including the *jus disponendi* (b).

The leading case of

HULME v. TENANT

[1 Bro. C. C. 16; 1 W. & T. L. C. 521]

is usually referred to as most fully establishing and illustrating this principle.

In this case a bill was filed by the obligee of a bond to secure £180 entered into by the defendants, husband and wife, against the husband, wife, and her surviving trustee, to recover the sums secured out of the wife's separate estate. Upon the marriage the estates of the wife had been conveyed to trustees, one part consisting of freehold and leasehold lands, in trust to receive and pay the rents and profits to the wife for her separate use, and to convey the estate itself to such use as she should by will or deed appoint, and, in default of appointment, to the use of her heirs and assigns; other parts to be sold, and out of the produce £1000 to be laid out according to the directions of the wife, the interest and profits to be paid to her, and the principal to her or her order by note or writing under her hand; and for want of such appointment, to her executors, administrators, and assigns. This £1000 had been raised, and the whole or the greatest part applied, so that the question in the cause was with respect to the remedy against the other estate. In 1769 the husband borrowed of the plaintiff, Mrs. Hulme, £50 upon his and his wife's

(b) *Fettiplace v. Gorges*, 1 Ves. jr. 46.

bond. In 1770, having occasion for a further sum, the wife herself applied to the plaintiff and borrowed £130, paid the interest due upon the former sum of £50, and gave a new bond for the £180.

Lord Chancellor Thurlow said that the rule had been laid down in *Peacock v. Monk* (c) that a *feme covert*, acting with respect to her separate property, was competent to act in all respects as if she were a *feme sole*, and that this rule was necessary to support the decisions on the subject. The question here went a little beyond that: it was not only how far she might act upon her separate property, but how far her general personal engagement should be executed out of her separate property. If she had by instrument contracted that this or that portion of her separate estate should be disposed of in this or that way, she and her trustees might have been decreed to make that disposition. But if she entered into an engagement which would have made a *feme sole* liable to the whole extent of the contract as to her person, &c., in every respect, such an engagement would not bind a *feme covert* as such; but determined cases seemed to show that her general engagement should operate upon her personal property, should apply to the rents and profits of her real estate, and that her trustees should be obliged to apply personal estate, and rents and profits when they arose, to the satisfaction of such general engagement. The Court had not used any direct process against the separate estate of the wife; the manner of coming at such property had been by decree to bind the trustees as to personal estate in their hands, or rents and profits according to the exigency of justice, or of the engagement of the wife to be carried into execution. Beyond this the Court had not gone. It had never ordered a conveyance, or sale, or mortgage of real estate to satisfy such an engagement, nor would he order the execution of the power, so as to reach the real estate.

The result, therefore, was that the personalty, including leaseholds, and the rents and profits of the realty in the hands of the trustees, were held to be liable.

Our first inquiry will be as to the manner of creating separate estate; then as to the characteristics of separate estate.

I. *The Creation of Separate Estate.*

Gifts to
separate
use.

(1.) The separate estate of a married woman most usually arises from property being settled upon or devised or bequeathed to her, expressly limited to her separate use.

Trustees
not
needed.

Notwithstanding former doubts, it is now clear that the interposition of trustees is not necessary to the creation of separate estate (*d*). As a matter of convenience it is of course desirable, and the practice of appointing trustees of property limited to the separate use is accordingly all but invariable. But if no such appointment is made, equity will still effectuate the intention, and will hold the husband, who acquires the legal estate, trustee for his wife (*e*).

Form of
words im-
material.

No particular form of words is required to vest property in a married woman to her separate use, as long as the intention to give her such an interest in opposition to the legal rights of her husband is clear and unequivocal (*f*).

Illustra-
tions.

The following expressions have been held to be sufficient to exclude the marital rights of the husband—a gift or settlement to the wife, or to trustees for her, for her “sole and separate use” (*g*); “for her separate use” (*h*); “for her own use, and at her own disposal” (*i*); “for her own use, independent of her husband” (*k*); “for her own use

(*d*) *Newlands v. Paynter*, 4 My. & Cr. 408.

(*e*) *Parker v. Brooke*, 9 Ves. 583; *Rich v. Cockell*, 9 Ves. 375.

(*f*) *Stanton v. Hall*, 2 R. & My. 180.

(*g*) *Parker v. Brooke*, *sup*.

(*h*) *Massy v. Rowen*, 4 L. R. H. L. 288, 294.

(*i*) *Inglefield v. Coghlan*, 2 Coll. 247.

(*k*) *Wagstaffe v. Smith*, 9 Ves. 520.

and benefit, independent of any other person" (*l*); "that she should receive and enjoy the issue and profits" (*m*); or where there is a direction that the "interests and profits be paid to her, and the principal to her, or to her order by note in writing under her hand" (*n*); or "her receipt to be a sufficient discharge" (*o*); or that the husband "is to have no control" (*p*).

On the other hand, since an unequivocal intention to exclude the husband's rights must be shown, it has been held that no separate use is created by a direction "to pay to a married woman and her assigns" (*q*); or to pay a fund "into her own proper hands to and for her own use and benefit" (*r*); or where property is given "to her own use and benefit" (*s*); "to her absolute use" (*t*); or "to her own proper use and benefit" (*u*); or "to be under her sole control" (*x*).

Intention must be clear.

A distinction must be observed between the effect of certain words used in a gift to a woman already married, and the same words in a gift to a *feme sole* or widow. The expression "separate use" has a technical meaning, and is sufficient, whether the gift be to a married or to an unmarried woman, with or without the intervention of trustees, to impress the property given with the character of separate estate (*y*). But the expression "sole use" has no such technical meaning, and its interpretation depends on circumstances. The result of the cases is that if the words "sole use and benefit" are applied to a gift to a woman already married, they will suffice to exclude the husband's marital right, and to create a separate estate (*z*). Also if

Distinction between gifts to *feme sole* and *feme covert*.

(*l*) *Margetts v. Barringer*, 16 Sim. 568.

(*m*) *Tyrrell v. Hope*, 2 Atk. 558.

(*n*) *Hulme v. Tenant*, 1 Bro. C. C. 16.

(*o*) *Lee v. Prieaux*, 3 Bro. C. C. 381.

(*p*) *Edward v. Jones*, 14 W. R. 815.

(*q*) *Lumb v. Milnes*, 5 Ves. 517.

(*r*) *Tyler v. Lake*, 2 R. & My. 183.

(*s*) *Kensington v. Dollond*, 2 My.

& K. 184.

(*t*) *Exp. Abbot*, 1 Dea. 338.

(*u*) *Blacklow v. Laws*, 2 Ha. 49.

(*x*) *Massey v. Parker*, 2 My. & K. 174.

(*y*) See *Massy v. Rowen*, *sup.*

(*z*) *Inglefield v. Coghlan*, 2 Coll.

247; *Green v. Britten*, 1 De G. J. &

S. 649; *Hartford v. Power*, 2 I. R.

Eq. 212; *Bland v. Dawes*, 17 Ch. D.

794.

the intended beneficiary be a woman about to marry, or there are other expressions in the instrument from which it can be gathered that a future marriage was contemplated by the settlor or donor, these words will import exclusion of the husband, and will create a separate estate (*a*). Further, if in any case these words are used, and the property is at the same time vested in trustees, it seems that they will be considered sufficient to create a separate estate (*b*). But if the gift is to a woman unmarried, and not in contemplation of marriage, or to a widow, and without the interposition of trustees, the words "sole use and benefit" will not import exclusion of a future husband, and will not suffice to impress on the property the character of separate estate (*c*).

Agreement between husband and wife.

(2.) Where, apart from the Married Women's Property Act (*d*), a husband and wife agreed to live separate, and not to interfere with property which each might subsequently acquire, the wife's subsequently acquired property was considered as her separate estate (*e*). Apart also from Desertion. 20 & 21 Vict. c. 85 (*f*), where a husband deserted his wife, equity considered property acquired by her as separate estate (*g*).

Presents to wife.

(3.) Presents from a husband to his wife will be deemed separate estate where they are made absolutely, and not merely to be worn as personal ornaments (*h*). So a husband may make himself trustee for his wife of property to be held as her separate estate (*i*). It seems, also, that a gift from a stranger to a married woman, though not expressed to be for her separate use, would be considered separate estate (*k*).

(*a*) *Exp. Ray*, 1 Madd. 199, 207; *In re Tusey's Trust*, 1 Eq. 561; *Exp. Killick*, 3 M. D. & De G. 480.

(*b*) *Adamson v. Armitage*, 19 Ves. 416.

(*c*) *Gilbert v. Lewis*, 1 De G. J. & S. 38; *Lewis v. Matthews*, 2 Eq. 177; *Massy v. Rowen*, 4 L. R. H. L. 288; *Hartford v. Power*, 2 I. R. Eq. 212.

(*d*) *Infra*, p. 354.

(*e*) *Haddon v. Fladgate*, 1 Sw. & Tr. 48.

(*f*) *Infra*, p. 354.

(*g*) *Cecil v. Juxon*, 1 Atk. 278.

(*h*) *Graham v. Londonderry*, 3 Atk. 393; *Grant v. G.*, 34 Beav. 623.

(*i*) *Mcurs v. M.*, 15 Beav. 529.

(*k*) *Graham v. Londonderry*, *sup.*

(4.) The savings which a married woman may make out of separate property are considered as separate estate (*l*). She has the same power with respect to them, and they are subject to the same liabilities (*m*). Similarly, arrears of separate estate in the hands of trustees will be considered as retaining their original character (*n*). Where, also, a husband living separate from his wife remits money to her for her support and maintenance, such money, and any savings which the wife may make out of it, will be considered separate estate (*o*). Savings
out of
separate
property.

(5.) A married woman is entitled as to separate estate to any outlay made by her husband on real property settled to her separate use—for instance, to houses which he builds thereon, or improvements made (*p*). Outlay on
separate
property.

As to separate estate under 20 & 21 Vict. c. 85, and 33 & 34 Vict. c. 93, see *infra*, pp. 354 *et seq.*

II. *The Characteristics of Separate Estate.*

In considering the question of the alienation or disposition of her separate estate by a married woman, it is convenient to distinguish first between voluntary dispositions and involuntary dispositions which depend upon the liability of the property to debts.

(1.) *Voluntary dispositions.*

(i.) Where the married woman has an absolute interest.

As to personalty settled upon a married woman for her separate use, it is well established that she may enjoy it with all its incidents, and may dispose of it either by acts *inter vivos* or by will (*q*); and this whether the property be in possession or reversion (*r*). Personalty
settled
absolutely
alienable.

(*l*) *Gore v. Knight*, 2 Vern. 535; *Askew v. Rooth*, 17 Eq. 426.

(*m*) *Butler v. Cumpston*, 7 Eq. 16.

(*n*) *Ashton v. McDougall*, 5 Beav. 56.

(*o*) *Brooke v. B.*, 25 Beav. 342.

(*p*) *Barrack v. McCulloch*, 3 K. & J. 110, 124; *Grant v. G.*, 34 Beav.

623.

(*q*) *Fettiplace v. Gorges*, 1 Ves. jr. 46; 3 Bro. C. C. 8; *Rich v. Cockell*, 9 Ves. 369; *Willock v. Noble*, 7 L. R. H. L. 580.

(*r*) *Sturgis v. Corp.*, 13 Ves. 190; *Stamford &c. Bank v. Ball*, 4 De G. F. & J. 310, *infra*, p. 374.

Life
interest in
realty.

As to real estate, it has always been admitted that a married woman has the same power over her life interest in real estate settled to her separate use as if she had been a *feme sole*. She may without restriction give or sell or mortgage it (s).

Realty
alienable
by will,

and by
deed.

It was, however, long doubtful whether real estate could be disposed of by will, unless an express power of appointment was given, or by act *inter vivos* otherwise than by fine and recovery, or (since 3 & 4 Will. IV. c. 74) by deed acknowledged. But it was clearly decided in the important case of *Taylor v. Meads* (t) that it is not now necessary to the devise of such estate that there should be any express power to that end, nor is it necessary to an alienation by act *inter vivos* that there should be a deed acknowledged under the statute. This case, which may be referred to for a full discussion of the whole subject now under view, confirmed the previous decisions of *Peacock v. Monk* (u), *Tullet v. Armstrong* (x), *Adams v. Gamble* (y), and others.

The married woman has this power equally when trustees are interposed and when they are not (z). If there are trustees, their assent to the disposition is not necessary, unless expressly made so by the instrument creating the trust (a).

She may transfer her interest also as well to her husband as to anyone else (b), though a husband so receiving property must be prepared to show that it was clearly intended as a gift (c).

Intestacy
as to
personal
estate.

On the death of a married woman without having disposed of her separate estate, the old rules of common law still apply. Thus personalty in possession will belong to

(s) *Stead v. Nelson*, 2 Beav. 245 ;
Major v. Lansley, 2 R. & M. 357.

(t) 34 L. J. Ch. 203 ; 4 De G. J.
& S. 597.

(u) 2 Ves. sr. 190.

(x) 1 Beav. 1 ; 4 My. & C. 377.

(y) 12 Ir. Ch. R. 102.

(z) *Hall v. Waterhouse*, 13 W. R.
633.

(a) *Essex v. Atkins*, 14 Ves. 542 ;
Hodgson v. H., 2 Keen, 704.

(b) *Grigby v. Cox*, 1 Ves. sr. 518.

(c) *Rich v. Cockell*, 9 Ves. 375.

her husband *jure mariti* (*d*); personalty not reduced into possession will belong to him on his taking out administration (*e*); real estate will descend to her heir, subject to the husband's curtesy (*f*).

It may be here conveniently mentioned that if a husband, in exercise of his legal right, assigns his wife's separate property to a purchaser for value without notice, she has no remedy against the purchaser (*g*). Assign-
ment by
husband.

(ii.) Where the married woman has a partial interest.

It is scarcely necessary to say that where there is a gift absolutely to a married woman, but only the life interest is limited to her separate use, the *corpus* of the estate, being unaffected by the separate use, is not in her power, and an attempted devise thereof would be invalid (*h*).

There is more difficulty with respect to the cases in which there is an express estate for life given to the separate use of a wife, with a power of appointment over the *corpus* after her death. Formerly the opinion seems to have been that the capital could then only be disposed of by an execution of the power strictly in compliance with the provisions of the instrument conferring the estate (*i*). Modern decisions, however, have continually been bringing such cases nearer to the principle of *Taylor v. Meads* (*k*); and now, where there is a gift to a wife to her separate use for life, remainder as she shall, notwithstanding her coverture, by deed or will appoint, high authority shows that it will be treated as an absolute gift to her sole and separate use, so as to fully vest in her the entire *corpus* for all purposes (*l*). Life
interest
with power
of appoint-
ment.

(2.) *Involuntary dispositions.*

The law as to the liability of separate estate to the debts Liability

(*d*) *Molony v. Kennedy*, 10 Sim. 254.

(*e*) *Proudley v. Fieldes*, 2 My. & K. 57.

(*f*) *Roberts v. Dixwell*, 1 Atk. 607; *Appleton v. Rowley*, 8 Eq. 139; *Steward v. Blakeway*, 4 Ch. 603.

(*g*) *Dawson v. Prince*, 4 De G. & J. 41.

(*h*) *Troutbeck v. Boughey*, 2 Eq. 534.

(*i*) *Bradly v. Westcott*, 13 Ves. 445, 451; *Socket v. Wray*, 4 Bro. C. C. 483.

(*k*) *Sup.*

(*l*) *London Chartered Bank of Australia v. Lempiere*, 4 L. R. P. C. 572; *Bishop v. Wall*, 3 Ch. D. 194.

of separate estate to debts. and engagements of married women has steadily and continually developed in the direction of favouring creditors, and treating the separate estate just as the absolute property of a man would be treated.

Fraud. (i.) The strongest case for attaching liability to separate estate is where a married woman has been guilty of fraud. Long before the capability of a married woman to bind her separate estate by contracts was recognised, it was settled that she was capable of committing fraud, and was liable to the usual consequences of such an act. Thus in *Savage v. Foster* (*m*), where a married woman knowing her own title to property, suffered a purchaser to acquire it for valuable consideration by concealing her title, she was not allowed afterwards to set up her title against the purchaser. In cases of fraud, moreover, property settled on her for life with a general power of appointment which she exercises, is, equally with property settled on her absolutely, liable to supply any deficiency (*n*).

Breach of trust. (ii.) A married woman will render her separate estate liable by concurring with her trustees in a breach of trust (*o*), and she cannot call upon the trustees to replace it (*p*). So by herself committing a breach of trust in respect of other property under the trust (*q*) she renders her separate estate liable, unless she is restrained from anticipation (as to which generally, see *infra*, p. 348 *et seq.*); and, notwithstanding such restraint, arrears of income under the trust are also liable (*r*), but not future income (*s*).

(iii.) It was long after the recognition for many purposes of separate estate, that a married woman was first deemed capable of contracting debts in respect of such estate; and it is only quite recently that her capacity to do so has been fully accepted with all its consequences.

Specialty debts. As might have been expected, the first step was to hold

(*m*) 9 Mod. 35.

(*n*) *Vaughan v. Vanderstegen*, 2 Drew, 165.

(*o*) *Brewer v. Swirles*, 2 Sm. & G. 219; *Jones v. Higgins*, 2 Eq. 538.

(*p*) *Crosby v. Church*, 3 Beav. 485.

(*q*) *Clive v. Carew*, 1 J. & H. 199.

(*r*) *Pemberton v. M'Gill*, 1 Dr. & Sm. 266.

(*s*) *Ibid.*; *Clive v. Carew*, *supra*.

that specialty debts, such as those secured by a bond under her hand and seal, should be binding on her to the extent of her separate property. As to this the principal case of *Hulme v. Tenant* is a leading authority. There she had joined with her husband in the bond; but cases are numerous, from *Lillia v. Airey* (*t*) down to *Mayd v. Field* (*u*), in which the same has been held under various circumstances.

(iv.) Then the principle was extended to instruments of a less formal character, such as a bill of exchange accepted (*x*) or endorsed (*y*), and to a promissory note (*z*). Negotiable instruments.

(v.) The next step was its application to general written agreements—for instance, an agreement to pay additional rent for a house (*a*); also to the payment of the costs of a solicitor whom she had instructed (*b*). Written agreements generally.

(vi.) Up to this point the principle on which the separate estate was held to be liable was often represented to be that the written engagements in question operated as appointments of the settled property, and acquired their validity as such, rather than as contracts; and as long as it rested on this ground it is clear that no liability could arise from merely verbal contracts. But by many authoritative decisions this view of the question has been completely exploded (*c*), and it is now well established that separate estate will be bound by general verbal engagements, whether in the form of express contract or of the nature of an *assumpsit* (*d*); though of course the fact of the party being a married woman will not dispense with the necessity of a written contract, where it is otherwise required (*e*). Verbal contracts.

(vii.) It yet remained to be decided whether a married Life estate

(*t*) 1 Ves. jr. 277.

(*u*) 3 Ch. D. 387.

(*x*) *Stuart v. Kirkwall*, 3 Madd. 387; *Owen v. Homan*, 4 H. L. 997.

(*y*) *M'Henry v. Davies*, 6 Eq. 462; 10 Eq. 88.

(*z*) *Bullpin v. Clarke*, 17 Ves. 365; *Field v. Sowle*, 4 Russ. 112.

(*a*) *Master v. Fuller*, 4 Bro. C. C. 19; 1 Ves. 513.

(*b*) *Murray v. Barlee*, 3 My. & K. 210.

(*c*) *Murray v. Barlee*, 3 My. & K. 210, 223; *Owens v. Dickenson*, Cr. & Ph. 53.

(*d*) *Vaughan v. Vanderstegen*, *sup.*; *Johnson v. Gallagher*, 3 De G. F. & J. 494; *Matthewman's Case*, 3 Eq. 787.

(*e*) *Re Sykes' Trust*, 2 J. & H. 415.

with
general
power of
appoint-
ment by
deed or
will.

woman's general engagements would bind property settled on her for life with a general power of appointment which she has exercised. At length, in an important case already referred to (*f*), it was held that where such general power of appointment was exerciseable by *deed or will*, the property might be charged by her act. There the charge had a special reference to the separate property; but reading that case along with *Vaughan v. Vanderstegen* and others above cited, we should be led to the conclusion that property so settled would be subject to general engagements. We are not, however, now left to such an inferential conclusion, for it has recently been decided, where property was settled on a married woman for her separate use for life, with remainder to such persons as she should *by her will* appoint, she having made a testamentary appointment, that the property was liable to the payment of her debts, as if it had been settled on her absolutely (*g*). It will be observed that here the power of appointment could only be exercised *by will*. *A fortiori*, therefore, would property be liable which was subject to appointment by will or deed. Of course it will also be noted that such liability only arises in cases where the power has been exercised; it cannot affect persons entitled under a gift over in default of appointment.

By will
only.

Extent of
the lia-
bility.

(viii.) The extent of the liability was by *Hulme v. Tenant* shown to reach to the whole of any personal property settled, and to the rents and profits of the realty. But since the case of *Taylor v. Meads* (*h*) it will be consistent that it should be extended to the *corpus* of the realty as well as to that of personalty. In no case can a personal decree in respect of debts be made against a married woman (*i*).

Liability
of husband
to main-

The fact of a married woman having separate estate does not affect the legal liability of her husband to provide for

(*f*) *London Chartered Bank &c. v. Lempriere*, 4 L. R. P. C. 572.

(*h*) 4 De G. J. & S. 597.

(*g*) *In re Harvey's Estate*; *Godfrey v. Harben*, 13 Ch. D. 216.

(*i*) *Francis v. Wigzell*, 1 Madd. 264.

and maintain her and the family (*k*). She may, if necessary—for instance, in case of her husband's lunacy—pledge his credit for her own maintenance, and his estate will be liable (*l*). And though she is now liable to the parish for the maintenance of her husband and children, this does not relieve him from his primary liability (*m*). tain wife and family.

In special circumstances, however—for instance, where a married woman was lunatic, and the husband was in poor circumstances—an allowance has been made out of the separate estate to meet extraordinary expenses incurred in maintenance (*n*). And it would not, it seems, be necessary to show extreme poverty on the part of the husband to justify such an allowance (*o*). Allowance out of separate estate for this purpose.

After the death of a *feme covert* having separate estate, creditors may proceed against her separate estate for the payment of their debts (*p*). If she has left a will, her estate will be administered according to the ordinary rules in creditors' suits. Administration of married woman's estate.

(3.) *Permissive dispositions.*

Intermediate in character between those cases in which a married woman by her own direct conveyance or transfer alienates her separate estate, and those in which the law lays its hand upon it as satisfaction for her debts and engagements, there is a class of dispositions, which if not exactly correlative with the others named, is yet of a sufficiently distinctive character to justify a separate consideration.

(i.) It often happens that, without any formal disposition of the *corpus* of her property, a married woman expressly authorises monies arising therefrom to be paid to her husband; perhaps it is still more frequent that there is a tacit permission of such payments. A leading authority in such circumstances is the case of *Caton v. Rideout* (*q*), Authority given to husband to receive income.

(*k*) *Hodgens v. H.*, 4 Cl. & F. 323, 373.

(*l*) *Davidson v. Wood*, 11 W.R. 561.

(*m*) 33 & 34 Vict. c. 93, ss. 13, 14.

(*n*) *Edwards v. Aubrey*, 2 Ph. 37;

In re Baker's Trusts, 13 Eq. 168.

(*o*) *Brodie v. Barry*, 2 V. & B. 39.

(*p*) *Owens v. Dickenson*, Cr. & Ph. 48.

(*q*) 1 Mac. & G. 601.

which establishes the general rule that whether there has been express authority or tacit permission for the husband to receive the income of the separate estate, he cannot after receiving it be called upon to account for it, and the wife cannot claim any reimbursement out of his estate. Especially would this be the case where the husband had been in the habit for a considerable time of receiving the monies, and applying them without question for the benefit of the family (r). Even if the circumstances of the case are not sufficiently strong to warrant absolute immunity from account, such account will not be extended beyond one year's receipts (s). If, however, the wife has not expressly authorised payment to the husband, nor tacitly acquiesced therein, or if the circumstances are such that her consent cannot be presumed, she will be entitled to be reimbursed out of his estate any payments that may have been improperly made to him (t).

No pre-
sumption
of gift to
husband as
to *corpus*.

It has already been stated that as regards the *corpus* of the separate estate, no presumption arises upon its transfer to the husband that a gift was intended. The onus of proving it so is on the husband, and in the absence of proof he will be deemed a trustee for the wife (u). Sufficient proof may be deduced from acts of the wife evidencing intention, without showing an express gift (x).

Loan to
husband
by wife.

(ii.) If a married woman makes a loan to her husband of or out of her separate property, she can recover the same as a creditor by proof in an administration suit (y).

III.—*Restraint on Anticipation.*

Origin of
restraint
on antici-
pation.

It is not surprising that the fact of its being held, as in *Hulme v. Tenant*, that the separate property of a married woman should be enjoyed by her with as much freedom of

(r) See also *Powell v. Hankey*, 2 P. Wms. 82; *Rowley v. Unwin*, 2 K. & J. 138.

(s) *Rowley v. Unwin*, *supra*.

(t) *Parker v. Brooke*, 9 Ves. 583.

(u) *Rich v. Cockell*, 9 Ves. 369.

(x) *Gardner v. G.*, 1 Giff. 126.

(y) *Woodward v. W.*, 3 De G. J. & S. 672.

disposition, and subject to the same liabilities as if she were a *feme sole*, should have exercised the ingenuity of conveyancers to devise means for preventing such results, and to preserve the settled property at once from voluntary alienation, in which the husband's influence might be exercised prejudicially to the wife's interest, and from liability to destruction through the wife's improvidence. To this end a clause was framed to the effect that the wife should not have power to alienate the property, or to anticipate the enjoyment of the income thereof (z). The only question was whether this direction would be sustained in equity. Such a clause would certainly have no effect in a limitation of property to a man or to an unmarried woman (a), from whom the *jus disponendi* cannot be taken away by a mere prohibition; but when the matter came before the Courts, the case of a married woman's separate estate was held to be distinguishable, and restraint on anticipation was deemed just and reasonable, inasmuch as it tended to further the object for which separate estate was first created (b). The clause is accordingly valid and efficacious in a settlement or a devise to a married woman, whether the property in question be real or personal estate, whether limited in fee or absolutely, or for life only (c).

1. *What words will restrain alienation.*

As in the case of separate use, no particular form of words is necessary to restrain alienation if the intention be clear. In addition to the common forms of expression, which are equivalent, with the addition of more or less conventional verbiage, to the clear words "without power of anticipation," it has been held that effectual restraint is imposed by a direction that a trustee shall during the lady's life receive the income "when and as often as the

How
effected.
No par-
ticular
form of
words
needed.

(z) *Pybus v. Smith*, 3 Bro. C. C. 339.

(a) *Brandon v. Robinson*, 18 Ves. 429.

(b) *Tullett v. Armstrong*, 1 Beav.

22.

(c) *Baggett v. Meux*, 1 Coll. 138; 1 Ph. 627; *Re Sykes' Trusts*, 2 J. & H. 415.

same shall become due," and pay it as she shall appoint, or permit her to receive it to her separate use, and that her receipts, or the receipts of any person to whom she may appoint the same after it shall become due, shall be valid discharges for it (*d*). So, also, if the property is "not to be sold or mortgaged (*e*), or if it is declared that the wife shall "not sell, charge, mortgage, or encumber it," though this may be followed by a declaration that she should take it to her own sole and separate use and benefit and disposal, and have the sole management thereof (*f*). It is not necessary that negative words should be introduced in the receipt clause; this must be construed to relate to the income, subject to such restraints as are imposed in the words of limitation (*g*).

Expres-
sions in-
sufficient.

On the other hand, the following expressions have been considered insufficient to show a clear intention to restrain anticipation: Where there has been a bequest of stock for the separate use of a wife for life, with a direction that it should "remain during her life and be under the orders of the trustees made a duly administered provision for her, and the interest given to her *on her personal appearance and receipt*" (*h*); and where the wife is to receive separate property "with her own hands from time to time," or "so that her receipts alone for what shall be actually paid into her own proper hands shall be good discharges" (*i*). In short, words which amount only to an amplification of the sense embodied in the expression "separate use" will not add to the force of that expression by effecting a restraint on anticipation (*k*). *Hovey v. Blakeman* (*l*), which seems contrary to this principle, has been virtually overruled by the other cases referred to. Where, again, it was provided in a gift to a wife for her separate use for life, and

(*d*) *Field v. Evans*, 15 Sim. 375;
Baker v. Bradley, 7 De G. M. & G.
597.

(*e*) *Steedman v. Poole*, 6 Ha. 193.

(*f*) *Baggett v. Meux*, 1 Coll. 138;
1 Ph. 627.

(*g*) *Harrop v. Howard*, 3 Ha. 624.

(*h*) *In re Ross's Trust*, 1 Sim. N.
S. 196.

(*i*) *Parkes v. White*, 11 Ves. 222;
Acton v. White, 1 S. & S. 429.

(*k*) *Pybus v. Smith*, 1 Ves. jr. 189;
3 Bro. C. C. 340.

(*l*) Cited, 9 Ves. 524.

after her decease to her appointees, that "in case any appointment should be made by deed, the same should not come into operation until after her death," it was held that there was no restraint on anticipation, and that she might appoint the fund by an irrevocable deed (*m*).

It must be carefully observed that a clause restraining anticipation will be invalid if its effect would be to transgress the rule as to perpetuities (*n*). Must conform to rule against perpetuities.

It was also held that in a bequest to persons in *esse* for life with remainder to their unborn children, with a general direction that the females should take for their separate and inalienable use, the restriction was void on the ground of its remoteness (*o*).

2. *The effects of restraint upon anticipation.*

It has already been observed that property in the hands of a *feme sole* cannot be made inalienable. The question, therefore, has arisen whether, when on the death of the husband of a married woman so restrained the restraint was discharged, it attached again on the occasion of a second marriage. This was decided in the affirmative in *Tullett v. Armstrong* (*p*). From that case the state of the law may be deduced as follows: If the gift be made for her sole and separate use, without more, she has, during the coverture, an alienable estate, independent of her husband. If, in addition to the limitation to her separate use, there is a restraint on anticipation, she has during the coverture the present enjoyment of an inalienable estate independent of her husband. In either case, she has when discover a power of alienation, since the restraint on anticipation is incident only to separate estate, and there can be no such thing as separate estate apart from coverture. But the restriction being a modification of the separate estate is inseparable from it, and it accordingly again comes into

Restraint renewed on second marriage.

(*m*) *Alexander v. Young*, 6 Ha. 393.

(*n*) *Fry v. Capper*, Kay, 163; *In re Teague's Settlement*, 10 Eq. 564; which were reluctantly followed in

In re Ridley, 11 Ch. D. 645; *Cooper v. Laroche*, 16 Ch. D. 368.

(*o*) *Armitage v. Coates*, 35 Beav. 1.
(*p*) 1 Beav. 1.

operation when, on a second coverture, the property again becomes separate estate (*q*).

Substitution of other property.

This being the case, the question often arises, in cases where the woman has while discovert aliened the property, and replaced it by other property, or otherwise dealt with it so as to alter its condition, whether such acts do not effectually discharge the property from all conditions, so that she in future holds it, whether sole or covert, discharged from all trust or restraint. The answer to this inquiry depends on circumstances.

When substituted property under restraint, and when not.

If the property remains during the time of the discoverture, and until a second coverture, in the hands of trustees *in statu quo*, no question arises. If even there be no trustees, and the property has not in the interim been dealt with, upon her subsequent marriage the separate use and the restriction attached revive (*r*). If, on the other hand, property vested in trustees has been sold during the discoverture at the woman's request, and the proceeds handed to her, the identity of the settled estate or fund is clearly gone, and accordingly the separate use, with all its incidents, completely ceases (*s*). Or if even the property is converted by means other than sale into property of a different kind, the trust ceases, and with it all the conditions thereof (*t*). The test question as to the continuance of the separate use and restraint on anticipation is whether the property can be identified, or whether it has lost its individuality in the meanwhile by the woman's dealing with it.

Separate use, &c., may be confined to one coverture.

It is, of course, quite possible to confine the trust for the separate use of a married woman to a particular coverture (*u*), but this will not be presumed when the words employed indicate an intention that it should continue during her life (*x*).

(*q*) See also *Woodmeston v. Walker*, 2 R. & My. 197; *Hawkes v. Hubback*, 11 Eq. 5.

(*r*) *Newlands v. Paynter*, 4 My. & Cr. 408.

(*s*) *Wright v. W.*, 2 J. & H. 655.

(*t*) *Ibid.* *Buttanshaw v. Martin*, Johns. 89.

(*u*) *Moore v. Morris*, 4 Drew, 33.

(*x*) *Gaffee's Settlement*, 1 Mac. & G. 541; *Hawkes v. Hubback*, *sup.*

A clause restraining anticipation will effectually prevent a married woman from alienating or charging any part of the *corpus* of the settled estate or fund during the coverture. So if the fund be in Court she cannot call for a transfer of it to herself (*y*). She can only deal with the interest after it has become payable, not having power even to assign an apportioned part of unpaid interest up to the date of the assignment (*z*).

The clause is equally efficacious to prevent an involuntary alienation by operation of law of the *corpus* or the future income of a fund, during the coverture. Thus not even for her fraud is such property chargeable (*a*). *A fortiori* it will not be liable for her debts or general engagements (*b*). The only charge which can affect a fund so restricted is the costs properly incurred by the trustees in the administration of the trust (*c*). But see *infra*, p. 358, as to the effect of 33 & 34 Vict. c. 93, s. 12, in these cases.

So strictly was the restraint on anticipation regarded that it could not until recently be dispensed with by a Court of equity, even where it was manifestly for the benefit of the married woman to do so, as where she was put to her election between her settled property and a bequest of much greater value (*d*). But now, by 44 & 45 Vict. c. 41, s. 39, the Court is empowered, with her consent, to bind her interest, where it appears to be for her benefit, notwithstanding the restraint.

It appears that the clause restraining anticipation does not exempt a married woman from the consequences of lapse of time and acquiescence (*e*), nor prevent her from binding herself by a compromise with her trustees (*f*).

(*y*) *In re Ellis's Trust*, 17 Eq. 409; but see also *Re Croughton's Tr.*, 8 Ch. D. 460.

(*z*) *In re Brett*, 2 De G. J. & S. 79.

(*a*) *Clive v. Carew*, 1 J. & H. 199; *Arnold v. Woodhams*, 16 Eq. 29.

(*b*) *Fitzgibbon v. Blake*, 3 Ir. Ch. Rep. 528.

(*c*) *D'Oechsner v. Scott*, 24 Beav. 239; *In re Kane*, 12 Eq. 115.

(*d*) *Robinson v. Wheelwright*, 21 Beav. 214; 6 De G. M. & G. 535; *Gaskell's Trusts*, 11 Jur. N. S. 780.

(*e*) *Derbishire v. Home*, 3 De G. M. & G. 80.

(*f*) *Wilton v. Hill*, 25 L. J. (Ch.) 156.

IV. *Statutory Separate Estate.*

20 & 21
Vict. c. 85.
21 & 22
Vict. c.
108.

1. 20 & 21 Vict. c. 85; 21 & 22 Vict. c. 108.

By sect. 21 of 20 & 21 Vict. c. 85, amended by sect. 8 of 21 & 22 Vict. c. 108, a wife deserted by her husband may, on application to a police magistrate or to justices in petty sessions, or to the Court, obtain an order for the protection of any money or property she may earn or become possessed of after such desertion against her husband or any person claiming under him; and such earnings and property will belong to the woman as if she were a *feme sole* (g).

Again, by 20 & 21 Vict. c. 85, s. 25, after a judicial separation is decreed between husband and wife, she is to be considered as a *feme sole* with respect to property of every description which she may acquire, or which may come to or devolve upon her; and if she shall die intestate the property shall go as if her husband had been then dead: if, moreover, she should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place, shall be held to her separate use, subject, however, to any agreement in writing made by her husband and herself while separate.

2. *The Married Women's Property Acts* (h).

M. W.
Prop. Acts.

These statutes have very greatly extended the principle of the separate use of her property by a married woman, and at the same time have considerably changed the legal relation of a husband and wife to each other and to third parties. It will be convenient to consider separately those clauses which relate to the creation of new classes of separate property and its investment, and those clauses which extend the legal remedies available between and against a husband and wife.

(g) See also 21 & 22 Vict. c. 108, ss. 6—10.

(h) 33 & 34 Vict. c. 93, and 37 & 38 Vict. c. 50.

(1.) *Separate property under the Statutes.*

33 & 34
Vict. c. 93.
s. 1.

By sect. 1 of 33 & 34 Vict. c. 93: "The wages and earnings of any married woman acquired or gained by her after the passing of this Act in any employment, occupation, or trade in which she is engaged, or which she carries on separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all investments of such wages, earnings, money, or property shall be deemed and taken to be property held and settled to her separate use, independent of any husband to whom she may be married, and her receipts alone shall be a good discharge for such wages, earnings, money, and property."

By sect. 7: "Where any woman married after the passing of this Act shall, during her marriage, become entitled to any personal property as next of kin or one of the next of kin of an intestate, or to any sum of money not exceeding £200 under any deed or will, such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to the woman for her separate use, and her receipts alone shall be a good discharge for the same." s. 7.

It will be observed that this section, while it gives a wife the separate use of property to any extent coming to her through an intestacy, does not affect any gift by deed or will other than *sums of money* not exceeding £200 (i). But this enactment will not in the least affect her equity to a settlement out of funds coming to her or to her husband in her right by deed or will: as to which see *infra*, pp. 362 *et seq.*

By sect. 8: "Where any freehold, copyhold, or customary-hold property shall descend upon any woman married after the passing of this Act, as heiress or co-heiress of an intestate, the rents and profits of such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to such woman for her s. 8.

(i) *King v. Voss*, 13 Ch. D. 504.

separate use, and her receipts alone shall be a good discharge for the same."

From the fact that the rents and profits here mentioned are not limited to those arising during the life of the married woman, it has been questioned whether this section does not apply to the *corpus* of descended estates (*k*).

ss. 2—5.

Sects. 2 to 5 of the same statute relate to the investment of separate estate by married women. Their effect is to admit of such separate property being invested in the name of the married woman in savings banks (post-office or otherwise), and government annuities (*l*); in the public stocks and funds (*m*); in shares and debentures to which no liability is attached, of any incorporated or joint-stock company (*n*); or in similar shares or debentures of any duly registered friendly or benefit society (*o*).

s. 10.

By sect. 10, a married woman is empowered to effect an insurance on her own or her husband's life to her separate use; and similarly a married man may effect an insurance on his own life on trust for the benefit of his wife for her separate use, and of his children, as may be expressed on the policy; and such insurance will then be free from the control of himself or his creditors, and will not form part of his estate.

It has been held that a policy on his own life effected by a trader under this section for the benefit of his wife, or his wife and children, will be valid, notwithstanding s. 91 of the Bankruptcy Act (*p*), but will be subject to the liability of repaying any premiums thereon which may have been paid out of the husband's estate, in fraud of his creditors (*q*).

s. 6.

And by sect. 6 of the Act under consideration, the rights of a husband's creditors are expressly protected against any of his property which may be invested by him in his wife's name under the above sections, in fraud of

(*k*) *King v. Voss*, 13 Ch. D. 504.

(*l*) s. 2.

(*m*) s. 3.

(*n*) s. 4.

(*o*) s. 5.

(*p*) 32 & 33 Vict. c. 71.

(*q*) *Holt v. Everall*, 2 Ch. D. 266, 276.

his creditors, and any monies so deposited or invested may be followed as if the Act had not been passed.

(2.) *Extension of legal remedies by the Statutes.*

(i.) Between husband and wife.

Sect. 9 of 33 & 34 Vict. c. 93, provides that in any s. 9. question between husband and wife as to any property declared by the Act to be the separate property of the wife, either party may apply by motion or summons in a summary way to the Court of Chancery or to a County Court (irrespective of the value of the property), and that thereupon the judge may make such order, direct such inquiry, and award such costs as he shall think fit, subject to appeal as in the case of a suit or equitable plaint.

(ii.) Between husband and wife, and third person.

Sect. 11 enacts that "A married woman may maintain s. 11. an action in her own name for the recovery of any wages, earnings, money, and property by this Act declared to be her separate property, or of any property belonging to her before marriage, and which her husband shall, by writing under his hand, have agreed with her shall belong to her after marriage as her separate property, and she shall have in her own name the same remedies, both civil and criminal, against all persons whomsoever for the protection and security of such wages, earnings, money and property, and of any chattels or other property purchased or obtained by means thereof for her own use, as if such wages, earnings, money, chattels, and property belonged to her as an unmarried woman; and in any indictment or other proceeding, it shall be sufficient to allege such wages, earnings, money, chattels, and property to be her property."

By sect. 12: "A husband shall not by reason of any s. 12. marriage which shall take place after this Act has come into operation, be liable for the debts of his wife contracted before marriage, but the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy such debts as if she had continued unmarried."

This section, under which it has been held that a restraint upon anticipation was no bar to a creditor's rights (*r*), required and has received legislative amendment. For if any property which the wife may have possessed before her marriage was not reserved on the marriage to her separate use, there remained no remedy for debts contracted by her before marriage. The husband was not liable, because the section expressly exempted him. The wife's property was not liable, because, not being reserved to her separate use, it did not come within the latter clause of the section. It was, therefore, enacted by 37 & 38 Vict. c. 50, that as to persons married after the 30th of July, 1874, the husband and wife shall be liable to be jointly sued for her ante-nuptial debts (*s*).

37 & 38
Vict. c. 50,
s. 1.

s. 2.

Again, by sect. 2 of the same statute, "The husband shall, in such action, and in any action brought for damages sustained by reason of any tort committed by the wife before marriage, or by reason of the breach of any contract made by the wife before marriage, be liable for the debt or damages respectively to the extent only of the assets hereinafter specified."

s. 5.

Sect. 5 specifies the assets so liable as follows:—

(1.) "The value of the personal estate in possession of the wife which shall have vested in the husband.

(2.) "The value of the choses in action of the wife which the husband shall have reduced into possession, or with reasonable diligence might have reduced into possession.

(3.) "The value of the chattels real of the wife which shall have vested in the husband and wife.

(4.) "The value of the rents and profits of the real estate of the wife which the husband shall have received, or with reasonable diligence might have received.

(5.) "The value of the husband's estate or interest in any property, real or personal, which the wife in contem-

plation of her marriage with him shall have transferred to him, or to any other person.

(6.) "The value of any property, real or personal, which the wife in contemplation of her marriage with the husband shall, with his consent, have transferred to any person with the view of defeating or delaying her existing creditors."

V. *Pin-Money.*

Analogous to separate estate, but in some respects requiring separate consideration, is what is termed the pin-money of the wife. It has, indeed, been said to be impossible precisely to express the distinction between pin-money and separate estate (*t*).

Pin-money may, however, be sufficiently described as an Definition. allowance settled upon a wife before marriage for the purpose of her separate personal expenditure. It is designed to defray her personal expenses, and to purchase dress and ornaments suitable to her husband's rank, so that it shall not be necessary for these purposes that she should be continually applying to her husband for money. Gifts and payments of money made for the same purposes by the husband during the coverture, are also considered as pin-money.

Almost the only questions respecting pin-money which come under judicial notice are those connected with claims for payment of arrears after a husband's death. The rules respecting such claims sufficiently distinguish pin-money from ordinary separate estate.

As a rule, when a wife permits her pin-money to run Arrears, considerably in arrear, she cannot on the death of her how far husband claim payment for more than one year prior to recover- his death (*u*). The income of her separate estate she may able.

(*t*) *Howard v. Digby*, 8 Bli. N. R. 259. *Townshend v. Windham*, 2 Ves. st. 7.

(*u*) *Aston v. A.*, 1 Ves. sr. 267 ;

No right to accumulate. save or spend as she pleases; but the purpose for which pin-money is provided is for expenditure as may be necessary; and if not required, if, for instance, the husband chooses to defray the expenses which would fairly come within it, the wife has no right to accumulate it. If, indeed, the husband has actually paid for all the wife's apparel, and provided for all her private expenses, it has been held that her pin-money is thereby satisfied, and that she cannot claim any arrears at all at his death (*v*). Again, pin-money being required only for the wife personally, her executors have no right to claim any arrears (*v*).

The only case in which more than one year's arrears has been allowed was where it appeared that the wife had complained of short payments of the money, and her husband had promised that she should have it at last. There she was held entitled to all the arrears due at her husband's death (*y*).

VI. *Paraphernalia*.

Defined. Such apparel and ornaments of a wife as are suitable to her condition in life, such as jewels, &c., given to her to be worn on her person, are called her paraphernalia (*z*). The family jewels of the husband, though worn by the wife, are not included, unless she acquires them as such by gift or bequest (*a*). As to gifts of jewels by a husband to his wife after marriage, it apparently depends on the intention whether they shall be deemed paraphernalia or separate estate. If given only for the express purpose of her wearing them, they are paraphernalia (*b*); if given to her absolutely, they become separate property (*c*). Such

(*v*) *Thomas v. Bennett*, 2 P. Wms. 341; *Howard v. Digby*, 8 Bli. N. R. 269.

(*x*) *Ibid*.

(*y*) *Ridout v. Lewis*, 1 Atk. 269.

(*z*) *Graham v. Londonderry*, 3 Atk.

394.

(*a*) *Jerroise v. J.*, 17 Beav. 570.

(*b*) *Ibid*.

(*c*) *Graham v. Londonderry*, *sup*;

Grant v. G., 13 W. R. 1057.

articles given by a person other than the husband, are usually deemed to constitute separate property (*d*).

During the life of the husband and wife, the husband may dispose of the wife's paraphernalia either by sale or gift *inter vivos*; but he cannot dispose of them by will (*e*). If, however, he purports to do so, and by the same will confers other benefits upon his wife, she will be put to her election between her paraphernalia and such benefits (*f*). The wife has no power to dispose of her paraphernalia, either by gift or will, during the husband's lifetime (*g*).

The paraphernalia are liable to the debts of the husband (*h*), but in the administration of the assets of a deceased husband, his widow's claim to paraphernalia is preferred to the general legacies (*i*). She is, therefore, entitled to marshal the assets in her favour in all cases in which a general legatee can do so (*k*). Where, moreover, the husband in his lifetime has not alienated but has merely pledged his wife's paraphernalia, on his death she is entitled to have them redeemed, if the estate be sufficient, even to the prejudice of his legatees; her claim being higher than that of pure volunteers (*l*).

(*d*) *Lucas v. L.*, 1 Atk. 270.

(*e*) *Seymore v. Tresilian*, 3 Atk. 358.

(*f*) *Churchill v. Small*, 2 Kenyon, pt. 2, p. 6.

(*g*) 1 Bright. H. & W. 287.

(*h*) *Campion v. Cotton*, 17 Ves. 273.

(*i*) *Tipping v. T.*, 1 P. Wms. 729.

(*k*) See *infra*, pp. 501, 510.

(*l*) *Graham v. Londmerry*, *sup.*

Husband's
power over
parapher-
nalia.

Liability
to hus-
band's
debts.

SECTION II.—A WIFE'S EQUITY TO A SETTLEMENT.

I. *History of the Doctrine.*II. *Characteristics of the Principle.*

Elibank v. Montolieu.

Murray v. Elibank.

1. *The Rights of the Children.*2. *Out of what Property Settlement may be claimed.*3. *Waiver of Settlement.*4. *What circumstances will bar the Equity.*5. *Amount of the Settlement.*6. *Form of Settlement.*7. *How far Settlement binds Creditors.*III. *Reduction into Possession by Husband of Wife's Property.*IV. *Fraud on Marital Rights.*

Strathmore v. Bowes.

1. *Statement of the Principle.*2. *When undisclosed Settlements valid.*

The second of the great principles by which equity has modified the doctrines of common law respecting the status of married women, is that known as the wife's equity to a settlement.

Rights of
husband
at law.

As we have seen, at common law (apart from recent legislation) a husband on marriage became entitled to receive the rents of the wife's real estate during their joint lives, and entitled absolutely to all her chattels personal in possession, and to her choses in action if he reduced them into possession during the coverture. These rights, moreover, have always been recognised in equity,

and apply equally to both legal and equitable property. *Primâ facie*, therefore, the wife's property, whether in law or in equity, becomes the husband's on the marriage.

But though equity so far followed the law as not to take the initiative in any interference with the husband's legal rights, yet in cases in which it was necessary for the husband to seek the assistance of the Court in order to obtain possession of the wife's property, the Court, acting upon the maxim that "he who seeks equity must do equity," long ago adopted the practice of refusing that assistance unless the husband consented to make an adequate settlement out of such property for the benefit of the wife and children.

But the jurisdiction which was thus first exercised only when the husband came before the Court as a plaintiff, did not long remain so confined. The next step in its development was its application against the assignees of a bankrupt or insolvent husband, or under a general assignment for the payment of his debts; these being held entitled to relief only on the same terms on which it would have been granted to the husband himself (*m*).

The Court of Bankruptcy has, it seems, jurisdiction to order a settlement to be made upon the wife of a bankrupt who insists upon her right (*n*).

Then, on the ground that it was absurd to allow a husband by an assignment for valuable consideration to put the assignee in a better position than himself, and thus indirectly to defeat the equity of the wife, the Court maintained the same doctrine in suits by purchasers (*o*) and mortgagees (*p*).

Lastly we come to the full development of the principle in the leading case of *Elibank v. Montolieu* (*q*), in which a wife was permitted to assert her right in equity

Progress of equitable doctrine.

Settlement as against husband when plaintiff.

Against assignees of insolvent husband.

Against purchaser.

Settlement at the suit of the wife.

(*m*) *Oswell v. Probert*, 2 Ves. jr. 680; *Jewson v. Moulson*, 2 Atk. 417, 420.

(*n*) *Exp. Norton*, 8 De G. M. & G. 258.

(*o*) *Macaulay v. Philips*, 4 Ves. 15, 19.

(*p*) *Scott v. Spashet*, 3 Mac. & G. 599.

(*q*) *Infra*, p. 364.

as a plaintiff, without the necessity of waiting until the husband might need the aid of the Court.

From the provisions of the Married Women's Property Act (r) already referred to, it is evident that the importance of the doctrine in question has been much diminished, the several species of property therein mentioned being now entirely set apart for a wife's separate use. The Act, however, does not in the least prejudice her rights with respect to property not included in the Act, as to which her equity to a settlement remains on the same footing as before. Nor has it any application to persons married before the 9th August, 1870.

II. *Characteristics of the Principle.*

LADY ELIBANK v. MONTOLIEU

[5 Ves. 737; 1 W. & T. L. C. 464]

is the leading authority which decides that a married woman is entitled on her bill in equity to a provision in favour of her and her children out of personal estate coming to her as next of kin of an intestate. The facts were briefly as follows :—

In 1795, Lady Cranstown died intestate, possessed of large personal property, leaving two brothers and two sisters her next of kin. Lewis Montolieu, one of her brothers, took out letters of administration to her. The bill was filed by Lady Elibank, one of the sisters, against her husband Lord Elibank, and against Montolieu, praying an account of the plaintiff's share, and that it might be settled on her and her family.

Montolieu by his answer claimed to retain Lady Elibank's share towards satisfaction of a debt due to him by Lord Elibank upon certain bonds, upon the ground that a provision was made for the plaintiff by a settlement previous to her marriage.

(r) 33 & 34 Vict. c. 93.

Lord Chancellor Loughborough decided that the administrator had no right to retain ; he was trustee for the next of kin, and the plaintiff being one of them, if she had any equity against her husband with regard to the money, that equity would clearly bar any right of retainer on the part of the administrator. The only difficulty in the case was whether a married woman, by her next friend, could be the plaintiff in that Court ; but if she was entitled, and there was no way of asserting her right against her husband except by a bill, that objection did not weigh much. If *Montolieu* had done the right thing, and what he certainly would have done but for his own interest, he would have been the plaintiff desiring the Court to dispose of the fund. Then it was very clear that it would have been a matter of course to have pronounced upon the wife's equity. The money would not have been suffered to be paid to *Lord Elibank* without making a provision for her, the provision upon her marriage being clearly not adequate to her fortune.

It was declared that *Montolieu* was not entitled to retain in satisfaction of the debt due from the defendant, *Lord Elibank*, to him, but that the distributive share accruing to the plaintiff was subject to a further provision in favour of her and her children ; and it was referred to the Master to take the accounts and see that a proper settlement was made accordingly.

The interest of children in their mother's equity was the subject of discussion in

MURRAY v. LORD ELIBANK

[10 Ves. 84 ; 13 Ves. 1 ; 1 W. & T. L. C. 471].

Lady Elibank, the plaintiff in the above-mentioned case, having died intestate before the Master had made the report therein directed, a bill was filed by the infant children of *Lord Elibank*, stating the proceedings in that case, and praying that it might be declared that the plaintiffs and the defendant *Alexander Murray*, another

child of Lord and Lady Elibank, had a right to have a provision made for them out of their mother's share of the personal estate of Lady Cranstown, and that it might be referred to the Master to approve of a proper settlement accordingly.

To this bill the defendant Montolieu demurred, on the ground that the equity to a settlement out of a married woman's property depended entirely on her desire, and that the Court would not refuse her the power of giving the property to her husband.

Lord Eldon overruled the demurrer, observing that by the filing of the bill the Court became a trustee of the property, and thus the former trustee had no longer a right of dealing with the property; that decrees of the Court were only declarations of the rights of the parties when they began to sue. The wife had been declared to have a right to a provision for herself and her children, and had never waived that right. Though the right of the children depended upon the will of their mother, yet where an order had been made, and there had been no change of opinion expressed by her, it was not the practice to allow the husband to avail himself of the death of his wife to take the fund. The principle must be that the wife obtained a judgment for the children, liable to be waived if she thought proper; otherwise to be left standing for their benefit at her death.

1. *The rights of the children.*

The right to a settlement enjoyed by a married woman, may not as a rule be insisted upon by her, for her exclusive benefit. When from the nature of the estate or fund in question, provision can at the same time be made for her children, this is invariably done. Her equity and the equity of the children are treated as one equity, and if asserted it must be asserted for their common benefit (s).

Nevertheless, the power of asserting it is strictly personal

Equity to
a settle-
ment in-
cludes
children,

but only

(s) *Johnson v. J.*, 1 J. & W. 472, 479.

to the wife. It rests completely in her option whether it shall be enforced or not. If, therefore, she dies without having taken any steps to claim it, the children cannot set up a claim (*t*). Further, the wife may at any time before the settlement is completed, waive her right to it, and thus defeat the interest of her children (*u*). But if, as in the case of *Murray v. Elibank*, a decree of reference has been made to approve a proper settlement, and then the wife dies without having waived it, the children are then entitled to the benefit of the decree, even though they may not have been mentioned therein (*x*). wife can assert it.
She may waive it.

The making of the decree marks the exact point at which the right of the children attaches. The fact that proceedings have been commenced by the wife to secure a settlement is not sufficient (*y*). Still less would notice given by her to trustees in whom the fund was vested avail (*z*). But the right of the children will attach when the wife has entered into a contract with her husband or with her husband's assignees for a settlement of her property (*a*). Children's right attaches on decree,
or on contract for settlement.

Where, therefore, such a decree has been made or contract entered into, the children have a vested right to a provision, which is, however, liable to be divested by a waiver of the right by the wife (*b*); but her death without waiver will not prejudice it. This position continues until the execution of the settlement decreed or agreed upon; from which time, the right of the children becomes indefeasible, the wife having no longer the power to waive it (*c*).

Having already seen that a married woman's equity to a settlement may now be generally asserted by her as against

(*t*) *Scriven v. Tapley*, 2 Eden, 337.

(*u*) *Hodjens v. H.*, 11 Bli. N. S. 104; *Lloyd v. Williams*, 1 Madd. 450, 467.

(*x*) *Rowe v. Jackson*, Dick. 604; *Groves v. Perkins*, 6 Sim. 584; 1 Kee, 132.

(*y*) *De la Garde v. Lemprière*, 6

Beav. 344; *Lloyd v. Mason*, 5 Ha. 149.

(*z*) *Wallace v. Auldjo*, 2 Dr. & S. 216, 222.

(*a*) *Lloyd v. Williams*, *sup.*

(*b*) *Fenner v. Taylor*, 2 Russ. & M. 190.

(*c*) *Barker v. Lea*, 6 Madd. 330.

her husband and his assignees whether in bankruptcy or for valuable consideration, the next consideration is as to what property is affected by her right.

2. *Out of what property a settlement can be claimed.*

In the consideration of the different species of property affected by a wife's equity to a settlement, we shall be assisted by first observing two general principles respecting the doctrine.

The equity only attaches to what husband takes in wife's right.

(1.) The equity to a settlement does not attach on what a wife takes in her own right, but upon what the husband takes in right of the wife. Thus if property descends upon a married woman as tenant in tail, whatever her right to a provision out of the income, which her husband would at law be entitled to receive, she would have no equity to a settlement out of the *corpus*, to which the law gave him no claim in right of his wife (*d*).

It only attaches on the right to receive the property.

(2.) The equity to a settlement attaches not on the property itself, but on the right to receive it; that is to say, it only arises on the husband's legal right to present possession. Thus a wife cannot claim a settlement out of a reversionary interest in property as long as it continues reversionary (*e*).

Bearing in mind these general principles we shall the more easily follow the classification of those species of property subject to the obligation of a settlement.

Generally only equitable estates considered,

From the nature of the case it is evident that we have as a rule only to deal with equitable estates and interests. Such property as the husband could recover at law without the assistance of a Court of equity is unaffected by a doctrine which took its rise merely in the form of a condition imposed by equity on the granting of its assistance (*f*). And though by the Judicature Act (*g*) equitable estates and interests are now recognisable in Courts of law, this

(*d*) *Life Assoc. of Scotland v. Siddul*, 3 De G. F. & J. 271; *Re Cumming*, 2 *ibid.* 376.

(*e*) *Osborn v. Morgan*, 9 Ha. 434.

(*f*) But see *Ruffles v. Alston*, 19 Ec. 539, 546.

(*g*) 36 & 37 Vict. c. 66.

makes no difference, inasmuch as, by the same authority, the wife's equity would likewise be enforceable there. If, however, the property, though in its nature legal, becomes from collateral circumstances the subject of a suit in equity, it was held in the important case of *Sturgis v. Champneys* (*h*) that the wife's equity attached, Lord Cottenham considering that whatever cause brought the parties before the Court brought them within the operation of the maxim, "That he who seeks equity must do equity" (*i*). Thus, also, where a married woman was legal tenant in tail in possession of an estate which was subject to an equitable term of years to secure a jointure, the existence of the term was considered sufficient to entitle the wife to claim a settlement, the title to the rents being equitable as long as the term lasted (*j*).

The equity to a settlement, then, clearly attaches upon equitable choses in action to which the husband becomes entitled in the right of his wife (*k*). Though in some circumstances a settlement for life may be made out of an equitable estate of inheritance, equity will not interfere with the possible estate by curtesy of the husband (*l*). The fact, moreover, of a legacy being charged upon land, with a power of entry and receipt of the rents and profits, does not so deprive it of its equitable character as to interfere with the wife's right (*m*).

Where a husband in the right of his wife becomes entitled to a legal interest in leaseholds, the wife cannot claim a settlement thereout, and the husband can effectually dispose of them by sale or mortgage (*n*). But if the legal estate of leaseholds is in a trustee for the wife, it is now clearly decided that any disposition the husband may make is subject to his wife's equity (*o*).

(*h*) 5 My. & Cr. 97; and see *Gileares v. Paine*, 1 De G. J. & S. 87.

(*i*) See also *Oswell v. Probert*, 2 Ves. jr. 680.

(*j*) *Wortham v. Pemberton*, 1 De G. & Sm. 644.

(*k*) *Burdon v. Dean*, 2 Ves. jr. 607; *Smith v. Matthews*, 3 De G. F.

& J. 139.

(*l*) *Smith v. Matthews*, *sup.*

(*m*) *Duncombe v. Greenacre*, 28 Beav. 472; 2 De G. F. & J. 509.

(*n*) *Hatchell v. Eggless*, 1 Ir. Ch. 215; *Hill v. Edmonds*, 5 De G. & S. 603.

(*o*) *Hanson v. Keating*, 4 Ha. 1.

Life
interests
when sub-
ject to
settlement.

There are some important observations to be made with respect to a wife's right to a settlement out of property in which she has only a *life* interest. It is clear that if a husband fails to maintain his wife, whether by desertion or through becoming bankrupt, she will then be entitled to a settlement out of an equitable life interest as against him, and also against any one claiming under him by virtue of an assignment for value *made previously* to the desertion or bankruptcy (*p*), and, therefore, *à fortiori* against his general assignees in bankruptcy (*q*). It is also clear that if the husband is living with and maintaining his wife, she cannot claim a settlement out of a life interest against a particular assignee for value of her husband (*r*); and if such an assignment has been made it cannot be disturbed by any subsequent misconduct of the husband in not maintaining her (*s*). The right of a general assignee in bankruptcy only arises in case of the husband's incapacity to maintain his wife, and that incapacity at the same time raises the wife's equity, so that her claim is good against such general assignee (*t*). The only case which remains to be considered is whether a wife can claim her equity out of a life interest as against the husband himself as long as he continues to live with and maintain her. It is for two reasons submitted that she cannot. In the first place, the equity to a settlement is as a rule exerciseable by a wife only on behalf of herself and her children together, so much so that out of a fund in which she has an absolute interest she cannot claim a settlement on herself alone, to the exclusion of her children (*u*). But her children can have no provision made out of an interest which ceases with her life; so that her equity does not in this case stand on the same ground as in the other. Secondly, in consideration of maintaining

(*p*) *Sturgis v. Champneys*, 5 My. & Cr. 97; *Wright v. Morley*, 11 Ves. 12; *Elliott v. Cordell*, 5 Mad. 149.

(*q*) *Lamb v. Milnes*, 5 Ves. 517.

(*r*) *Tidd v. Lister*, 3 De G. M. & G. 857, 869.

(*s*) *Ibid.* 870; *In re Carr's Tr.*, 12 Eq. 609.

(*t*) *Elliott v. Cordell*, *sup.*

(*u*) *De la Garde v. Lemprière*, 6 Beav. 344.

his wife, the law vests the income of a legal interest entirely in the husband, and equity so far follows the law that in the absence of some special circumstance, such as desertion or insolvency, the practice is, even in the settlement of an absolute interest, to direct payment of the entire income to the husband. It would follow, therefore, that if there is no interest beyond an income for life, the wife cannot, as long as her husband maintains her, claim payment of any portion of it to herself. It was, moreover, so decided in *Vaughan v. Buck* (x), even though the wife there alleged that her maintenance was inadequate, and that her husband was in embarrassed circumstances. If this be correct, the head-note to the recent case of *Taunton v. Morris* (y) is misleading. The question did not in that case strictly arise, as the dispute there was between the wife and the husband's general assignee, he being insolvent, and turned exclusively on the amount which was proper to be settled. It decides that as to the amount of the settlement there is in a case of a husband's insolvency no difference to be regarded between *corpus* and income, or between an absolute and a life interest; but it does not purport to, nor does it in fact, overrule the case of *Vaughan v. Buck* (z), already referred to. It is true that this case was dissented from in *Wilkinson v. Charlesworth* and *Marsack v. Lyster* (a); but those cases were decided on other grounds, and are, as far as the present question is concerned, more than counteracted by the subsequent and higher authority of *Tidd v. Lister* (b).

It is clear, moreover, that a wife is not entitled to any settlement out of arrears of income accruing due before she has set up any claim thereto. Such income will be paid to her husband or his assignees (c). Arrears of income.

3. *Waiver of settlement.*

We have seen that as a general rule it is within the

(x) 13 Sim. 404.

(y) 11 Ch. D. 779.

(z) *Sup.*

(a) Reported together, 10 Beav. 324, 327.

(b) 10 Ha. 140; 3 De G. M. & G. 857, 869, 870.

(c) *Newman v. Wilson*, 31 Beav. 34; *In re Carr's Tr.*, *sup.*

option of a married woman to bar her own equity and that of her children by waiving her right to a settlement. It is, therefore, material in the next place to inquire by what means the waiver may be exercised, and to what limitations it is subject.

Consent to waive settlement must be taken by Court or commission, unless fund is less than £200.

(1.) Generally her consent to her husband receiving her property must be formally taken by her examination in Court (*d*), or before a commission issuing from the Court (*e*). Neither her husband nor any person connected with him should be present at the examination (*f*).

The consent of the wife is not requisite where the fund is under £200, though in these, as indeed in all cases (*g*), before payment, it must be shown that it is not already in settlement (*h*).

When there cannot be waiver. Infant. Ward of Court.

(2.) It is not in all cases and at all times open to a married woman to waive her right. Thus she cannot do so during infancy (*i*). A female ward of Court married without its authority cannot consent (*k*), except, perhaps, where the marriage has been with the consent of her guardian (*l*). When, moreover, a ward of Court is domiciled in a country where the principle of an equity to a settlement is not recognised, the Court will not part with her funds unless satisfied that a proper provision has been made for her (*m*).

Fund must be ascertained.

Further, consent will not be taken until the amount of the fund in question is ascertained (*n*); nor will it be binding if it has been made under the influence of mistake (*o*).

Consent to waive may be retracted.

Notwithstanding that consent has been given, it may be retracted at any time before the payment to the husband is made, or the transfer completed (*p*); and apart from

(*d*) *Beaumont v. Carter*, 32 Beav. 586, 590; *infra*, p. 374.

(*e*) *Tasburgh's Case*, 1 V. & B. 507.

(*f*) *In re Bendyshe*, 3 Jur. N. S. 727.

(*g*) *Britten v. B.*, 9 Beav. 143.

(*h*) *Elworthy v. Wickstead*, 1 J. & W. 69.

(*i*) *Stubbs v. Sargon*, 2 Beav. 496.

(*k*) *Stackpoole v. Beaumont*, 3 Ves. 89.

(*l*) *Bennett v. Biddles*, 10 Jur. 534.

(*m*) *In re Tweedale's Settlement*, Johns. 109.

(*n*) *Edmunds v. Townshend*, 1 Anst. 93.

(*o*) *Watson v. Marshall*, 17 Beav. 363.

(*p*) *Penfold v. Mould*, 4 Eq. 562.

that, the Court has power to postpone in its discretion the payment or transfer (q).

4. *What circumstances will bar the equity to a settlement.*

Not merely may a married woman deprive herself of her equity to a settlement by a voluntary waiver, but there are many circumstances apart from such consent which will effectually prevent her assertion of the right. Thus,—

(1.) Where the property, whether *corpus* or income, has once come to the hands of the husband, the wife can no longer claim her equity. And no transfer or payment so made by a trustee before action brought can be afterwards disturbed (r). Reduction into possession.

(2.) When a woman, at the time of her marriage, owes more than the whole amount of her property, she has no equity to a settlement out of it (s). But the mere fact of her having been indebted at that time would not prevent her claiming a settlement out of so much of the fund as remained after making provision for the payment of the debts (t). Her equity is also lost when her husband is indebted to the estate to an amount exceeding the wife's interest (u). Wife insolvent.

(3.) If an adequate settlement has already been made upon her, the wife's equity to a settlement is thereby barred for the future (v). It may also be barred by an express stipulation to that effect made before marriage, even though the settlement were inadequate (x). If the original settlement is adequate, it is not essential that it should have been made by the husband (y). Adequate settlement already made.

(4.) The equity to a settlement may be lost by the alienation by the wife of the property concerned. It is necessary, therefore, here to consider by what means such alienation may be effected. Alienation by the wife.

(q) *Wright v. Rutter*, 2 Ves. 673, 677.

(r) *Milner v. Colmer*, 2 P. Wms. 639, 641; *Allday v. Fletcher*, 1 De G. & J. 82.

(s) *Bonner v. B.*, 17 Beav. 86.

(t) *Barnard v. Ford*, 4 Ch. 247.

(u) *Knight v. K.*, 18 Eq. 487.

(v) *In re Erskine's Tr.*, 1 K. & J. 302.

(x) *Salway v. S.*, Amb. 692; *Garrow v. Bradley*, 2 Ves. sr. 675.

(y) *Giacometti v. Prodgers*, 8 Ch. 338.

As to
realty.
3 & 4
Will. IV.
c. 74;
8 & 9 Vict.
c. 106.

(i.) As to realty. By virtue of the Fines and Recoveries Act (z), and the Real Property Amendment Act (a), a married woman may now dispose of her estates of freehold, and may also release or assign any sum of money charged on lands, or the produce of land directed to be sold, whether her interest be in possession or reversion, by a deed duly acknowledged by her, after separate examination before a judge or two commissioners, and made with the concurrence of her husband.

She may also dispose of her copyholds by surrender, jointly with her husband, on being separately examined by the steward or his deputy.

(ii.) As to personalty.

Per-
sonalty.

A married woman's personal estate, as we have seen, vests in her husband on the marriage. During the marriage, therefore, she has no power of disposition over it, except in case of property or powers falling within 20 & 21 Vict. c. 57, presently mentioned. If her husband reduces her choses in action into possession they become his. If not, and his wife survives him, she will be entitled to them.

20 & 21
Vict. c. 57.

By 20 & 21 Vict. c. 57 (commonly known as Malins' Act), it is enacted that, after the 31st of December, 1857, it shall be lawful for a married woman to release or extinguish any power which may be vested in or limited to or reserved to her in regard to any personal estate, as fully and effectually as she could do if she were a *feme sole*, and also to release or extinguish her right or equity to a settlement out of any personal estate to which she, or her husband in her right, may be entitled in possession, under any instrument made after the 31st of December, 1857 (b). Her husband must, however, concur in the deed effecting this purpose, and the deed must be acknowledged in the manner prescribed by the Fines and Recoveries Act above quoted.

Rever-

It has already been stated that a wife has no equity to

(z) 3 & 4 Will. IV. c. 74.

(a) 8 & 9 Vict. c. 106.

(b) s. 1.

a settlement out of reversionary interests, the equity attaching not to the property itself, but to the right to receive it. Nevertheless, this is a convenient place in which to consider her power of disposition over such interests.

Previous to the year 1858 a married woman had no power to part with her reversionary interests in personal property. Not even with the assistance of the Court could she dispose of them (c).

But by 20 & 21 Vict. c. 57, above quoted, it was further enacted that, "After the 31st of December, 1857, it shall be lawful for every married woman by deed to dispose of every future or reversionary interest, whether vested or contingent, of such married woman, or her husband in her right, in any personal estate whatsoever, to which she shall be entitled under any instrument made after the said 31st day of December (except such a settlement as after mentioned), and also to release or extinguish any power which may be vested in or limited or reserved to her in regard to any such personal estate as fully and effectually as she could do if she were a *feme sole* . . . provided always that nothing herein contained shall extend to any reversionary interest to which she shall become entitled by virtue of any deed, will, or instrument by which she shall be restrained from alienating or affecting the same" (d).

"Every deed to be executed in England or Wales by a married woman for any of the purposes of this Act shall be acknowledged by her in the manner prescribed by 3 & 4 Will. IV. c. 74 . . . and all and singular the clauses and provisions in the said Act concerning the disposition of lands by married women, including the provisions for dispensing with the concurrence of the husbands of married women . . . shall extend and be applicable to such

(c) *Pickard v. Roberts*, 3 Mad. 56.
 384: *Purdew v. Jackson*, 1 Russ. 1, (d) s. 1.

interests in personal estate as may be disposed of by virtue of this Act" (e).

"The powers of disposition hereby given to a married woman shall not enable her to dispose of any interest in personal estate settled upon her by any settlement or agreement for a settlement made on the occasion of her marriage" (f).

These provisions precisely define the extent of a married woman's power over her reversionary interests in personalty, and require to be strictly complied with in any assignment thereof.

Fraud. (5.) A married woman's equity to a settlement may be barred by her fraud; for instance, by her concealing the fact of her marriage from a purchaser (g).

Adultery. (6.) If a wife is living in adultery apart from her husband, her right is generally barred (h); but if the husband also is living in adultery, it is not so (i); nor if, being a ward of Court, she marries without its consent (k).

Moreover, it seems that even in the absence of such circumstances, the husband will not be allowed to receive the whole of the property of a wife who is living in adultery, if he does not maintain her (l).

5. *Amount of the settlement.*

Where a wife has established her equity to a settlement, and the amount to be settled is not agreed upon between the husband and wife, the Court, in determining this, is guided by a consideration of the circumstances of the whole case (m). We shall consider separately the settlement of income and the settlement of *corpus*.

(1.) *As to income.*

Husband usually As a general rule, where the husband is solvent and has been guilty of no misconduct, the Court will not interfere

(e) s. 2.

(f) s. 4.

(g) *In re Lush's Tr.*, 4 Ch. 591.

(h) *Carr v. Eastabrook*, 4 Ves. 146.

(i) *Greeley v. Lavender*, 13 Beav. 62.

(k) *Ball v. Countts*, 1 V. & B. 292, 302, 304.

(l) *Ball v. Montgomery*, 2 Ves. jr. 191.

(m) *Carter v. Taggart*, 1 De G. M. & G. 289.

with his legal right, but will allow him to receive the whole income of the property. It is satisfied with retaining the capital, so as to give the wife a chance of taking it by survivorship (*n*).

But if the husband deserts his wife and leaves her unprovided for, she is entitled to the payment of the income of her property to herself (*o*).

takes
income.

Secus if he
deserts
her.

We have already seen that with respect to a life interest, a wife is entitled, in the case of desertion by, or the bankruptcy of, the husband, to a settlement on herself as against the husband, or his trustee in bankruptcy, or against an assignee for value, if the assignment has been made subsequent to the desertion. And it has been decided that such settlement may extend to the whole of the income (*p*). As long as the husband supports her, she cannot claim a settlement as against him, or against his assignee for value (*q*). Even in the case of a husband's insolvency, a settlement of income was refused where the wife had already an adequate provision for her separate use (*r*).

A woman cannot represent herself as deserted when she refuses to accompany her husband on his removing to another residence in the course of his business (*s*). If, moreover, a husband having separated from his wife, a decree has been made allowing her a separate maintenance out of income, on his subsequently consenting to cohabit with and maintain her, the Court has refused to continue the separate maintenance (*t*). The Court will, in short, always encourage reconciliation and cohabitation between husband and wife, and is thus indisposed to allow a separate maintenance to the wife unless the husband's neglect

(*n*) *Sleech v. Thorington*, 2 Ves. sr. 561; *Atcheson v. A.*, 11 Beav. 485.

(*o*) *Gilchrist v. Cator*, 1 De G. Sm. 188; *Dunkley v. D.*, 4 De G. & S. 570; 2 De G. M. & G. 390.

(*p*) *Taunton v. Morris*, 11 Ch. D. 779.

(*q*) *Supra*, pp. 370—1.

(*r*) *Aguilar v. A.*, 5 Madd. 414.

(*s*) *Bullock v. Menzies*, 4 Ves. 798.

(*t*) *Head v. H.*, 3 Atk. 296; *Gilchrist v. Cator*, *sup*

or cruelty, or other improper conduct, is such as to render his wife's leaving him necessary or justifiable (*u*).

(2.) *As to capital.*

One half
of capital
the rule,

The general rule, in the absence of special circumstances, is that one half of the wife's property shall be settled upon her, and the other half go to the husband or his assignees (*x*).

but subject
to discre-
tion.

This is, however, quite a matter for the discretion of the Court, which will take into consideration the amount of the wife's fortune already received by the husband; any previous settlement which may have been made (*y*); whether the wife has received any benefit out of the husband's property (*z*); the conduct and circumstances of the husband (*a*); and the conduct of the wife (*b*).

Circum-
stances of
influence.

Circumstances may appear under these considerations which will induce the Court to go so far as to settle the whole fund on the wife. Where the husband has already received a considerable fortune from her (*c*), where he has become insolvent and no settlement has been made (*d*), and where he has deserted or behaved cruelly to his wife (*e*), the whole fund has been settled; and the same was done where, in the absence of such circumstances, the fund was small and barely sufficient for a provision for the wife and children (*f*).

6. *Form of the settlement.*

Usual
limita-
tions.

The design of the settlement being to provide for the wife and children, the Court will, as far as possible, accomplish this, but will not interfere with the marital legal right farther than is necessary for this purpose. The usual limitations will be, therefore, as to personalty, to give the

(*u*) See *Oxenden v. O.*, 2 Vern. 493; *Eedes v. E.*, 11 Sim. 569.

(*x*) *Jewson v. Moulson*, 2 Atk. 417, 423; *Spirett v. Willows*, 1 Ch. 520.

(*y*) *Green v. Otte*, 1 S. & S. 250; *Napier v. N.*, 1 D. & W. 407.

(*z*) *In re Erskine's Tr.*, 1 K. & J. 302.

(*a*) *Coster v. C.*, 9 Sim. 597.

(*b*) *Giacometti v. Producers*, 14 Eq. 253; 8 Ch. 338.

(*c*) *Gardner v. Marshall*, 14 Sim. 575.

(*d*) *Francis v. Brooking*, 19 Beav. 347.

(*e*) *Dunkley v. D.*, 2 De G. M. & G. 390.

(*f*) *In re Kincaid's Tr.*, 1 Drew, 326; 17 Jur. 106.

income either to the husband, or his assignee, or to the wife for life for her separate use without power of anticipation, according to the circumstances above discussed, and the *corpus* to her children after her death (*g*); if there should be no issue the ultimate remainder will, it seems, be to the husband absolutely, whether he survives the wife or not (*h*). See, also, for a full discussion of the subject, *Spirett v. Willows* (*i*). The fact of the husband's insolvency, or his having assigned his interest, or of the wife's relations being in humble circumstances, is not sufficient reason for deviating from this rule in favour of the wife, or her next of kin (*k*).

In the case of a small fund the expense of a settlement has sometimes been avoided by ordering the fund to be brought into Court, and directing payment of the dividends to the wife during her life, and either declaring the trusts at her death, or giving liberty to the persons entitled to apply (*l*). Settlement sometimes dispensed with.

7. *How far the settlement binds creditors.*

Where the Court decrees a settlement upon a wife, it will be supported as a good settlement for valuable consideration (*m*). Settlement deemed on good consideration.

Further, if after marriage property accrues to the husband in right of the wife, which the husband cannot reach without the aid of the Court, and by agreement he consents to such a settlement as the Court would have ordered, this settlement will be maintained against creditors (*n*).

Even if trustees in possession of the property of a married woman should, on the mere request of her husband, transfer it to new trustees upon trust for her separate use, such trust will be good as against his creditors (*o*).

(*g*) *Gent v. Harris*, 10 Ha. 383.

(*h*) *Carter v. Taggart*, 1 De G. M. & G. 286; *Croxton v. May*, 9 Eq. 404; *Walsh v. Wason*, 8 Ch. 482.

(*i*) 4 Ch. 407.

(*k*) *Carter v. Taggart*, 1 De G. M. & G. 286.

(*l*) *Bagshaw v. Winter*, 5 De G. & Sm. 468; *In re Cutler*, 14 Beav.

220.

(*m*) *Wheeler v. Caryl*, Amb. 121; *Simson v. Jones*, 2 R. & M. 365.

(*n*) *Wheeler v. Caryl*, *sup.*; *In re Wray's Tr.*, 16 Jur. 1126.

(*o*) *Ryland v. Smith*, 1 My. & Cr. 53.

But if the husband has once reduced into possession the equitable choses in action of his wife, any subsequent settlement of them must conform to 13 Eliz. c. 5, or it will be void as against creditors (*p*).

III. *Reduction into Possession by Husband of Wife's Property.*

Having seen that a husband's right to his wife's choses in action depends upon his reducing them into possession, we are led by this case to inquire what acts amount to a reduction into possession.

Payment
to hus-
band.

1. The clearest case is of course where the husband actually receives payment of the sum in question—for instance, a sum due to her on a mortgage (*q*). If, however, he so receives money in the character of trustee, this will not amount to a reduction into possession (*r*).

Transfer
into his
name.

2. The transfer of a wife's stock into her husband's sole name, or even a transfer by his direction into the names of trustees, upon trusts inconsistent with his wife's equity amounts to a reduction into possession (*s*). But if such transfer, or the investment of stock belonging to the wife, be effected in a manner consistent with her equities, the case will be otherwise, and her right by survivorship will remain (*t*).

Suit by
husband
and wife.

3. If a husband and wife together sue to recover choses in action which belonged to the wife before marriage, judgment in the action amounts to reduction into possession by the husband (*u*); though if he dies after judgment, but before execution, the judgment will survive to the wife (*x*). But if the husband sues in his own name for a chose in action accruing to his wife during the marriage,

(*p*) *Ibid.* *Goldsmith v. Russell*, 5 De G. M. & G. 547.

(*q*) *Rees v. Keith*, 11 Sim. 388.

(*r*) *Baker v. Hull*, 12 Ves. 497 ;

Wall v. Tomlinson, 16 Ves. 413.

(*s*) *Hansen v. Miller*, 14 Sim. 22.

(*t*) *Ryland v. Smith*, 1 My. & C. 53.

(*u*) *Sherrington v. Yates*, 12 M. & W. 855.

(*x*) *Bond v. Simmons*, 3 Atk. 21.

and dies after judgment, his representatives, and not the wife, will be entitled (*y*).

4. Where the income of a married woman's life estate had been ordered to be received and applied by a receiver in a suit in payment of her husband's incumbrances, it was held that arrears of income in the receiver's hands which had not been paid as directed were by the effect of the order reduced into possession (*z*).

5. A sale by a husband of his wife's choses in action, followed by the purchaser's taking possession, will amount to a reduction into possession (*a*).

The general result is that any act which has the effect of changing the property in the choses in action will amount to a reduction thereof into possession (*b*). But acts which do not amount to this will not suffice. Thus there has been held to be no reduction into possession where there was a fund set apart for payment to the husband (*c*), where interest only had been paid to the husband (*d*), where the husband proved against the estate of a bankrupt indebted to his wife, but died before the declaration of a dividend (*e*). On the same principle, payment of a part of a fund only amounts to reduction, into possession *pro tanto* (*f*). As to a reversionary interest, an assignment, whether particular or general, could not suffice to bar the wife's right by survivorship (*g*).

If a husband fail actually to reduce his wife's choses in action into possession during her lifetime, he will, upon her death before him, be entitled to them as her administrator, provided that he has not already made an assignment of them, which though ineffective against her if she survived him, would be valid as against himself. If he dies with-

(*y*) *Oglander v. Baston*, 1 Vern. 396.

(*z*) *Tidd v. Lister*, 2 W. R. 184; 3 De G. M. & G. 857.

(*a*) *Widgery v. Tepper*, 5 Ch. D. 516.

(*b*) *Aitcheson v. Dixon*, 10 Eq. 589.

(*c*) *Blunt v. Bestland*, 5 Ves. 515.

(*d*) *Ibid.*; *Howman v. Corie*, 2 Vern. 190.

(*e*) *Anon.*, 2 Vern. 706.

(*f*) *Nash v. N.*, 2 Madd. 133, 139; *Scrutton v. Patello*, 19 Eq. 369, 373.

(*g*) *Hornsby v. Lee*, 2 Madd. 16.

out taking out letters of administration, his personal representative may become entitled by doing so (*h*).

Assign-
ment by
husband.

The rule is now well established that a husband by assigning his wife's choses in action can give no better right to another than he has himself. If the wife survives the husband the assignee of a reversionary interest can take nothing. If the husband survives the wife the assignee is entitled to the property (*i*).

Reversion-
ary in-
terests.

As to reversionary interests in particular, whether the husband after the assignment dies in the lifetime of the tenant for life, so that the chose in action cannot be reduced into possession, or whether he survives her without having actually reduced it into possession, the result is the same—the chose in action will survive to the wife (*k*). Moreover, a release by a husband of a reversionary chose in action of his wife is as inoperative against his wife as his assignment would be (*l*).

IV. *Fraud on Marital Rights.*

In the principles we have discussed respecting the separate estate of a married woman and her equity to a settlement, we have found the interference of equity directed to the design of granting relief in favour of the wife against the operation of the strict rules of ancient common law. From the case of

STRATHMORE v. BOWES

[1 Ves. sr. 22; 1 W. & T. L. C. 446]

we learn that on the other hand equity will sometimes assist a husband to the assertion of a right in circumstances in which he would have been without any remedy at law. In this case, Lady Strathmore, being possessed of considerable property, real and personal, pending a treaty of

(*h*) *In the goods of Harding*, 2 P. & D. 394.

(*k*) *Ellison v. Elwin*, 13 Sim. 309.

(*l*) *Rogers v. Acaster*, 14 Beav.

(*i*) *Purdew v. Jackson*, 1 Russ. 1. 445,

marriage with Mr. Grey, conveyed, and assigned, with the approbation of Mr. Grey, all her estate to trustees for her sole and separate use, notwithstanding any future coverture.

A few days after, hearing that Mr. Bowes had fought a duel on her account, she determined to marry him, and did so on the next day. Bowes had no notice of the settlement.

There were two bills—an original bill by Lady Strathmore to set aside a deed revoking the settlement, as having been obtained by duress, and a cross-bill by Bowes to set aside the settlement as against the rights of marriage, and to establish the deed of revocation.

An issue having been directed to try whether the deed of revocation had been obtained by duress, the verdict was against the deed. The cause coming on upon the equity reserved, there was a decree in favour of Lady Strathmore dismissing the cross-bill with costs. It came on again for a rehearing and reversal of that decree so far as it dismissed the cross-bill.

It was held under the circumstances that the settlement should be established, there being insufficient evidence of fraud; the principle was, however, fully recognised that a husband may in a proper case come into equity, and claim its assistance against a settlement of the wife's property which is concealed from him.

1. *Statement of the principle.*

This case, though under the circumstances there was held to be no fraud on marital rights, is usually referred to as a leading authority on the subject, because of the lucid statement therein contained of the principle concerned. The chief ground on which the decree rested was that there the settlement was not made in the course of the treaty of marriage with Bowes. There was, therefore, no fraud upon him, and the deed being *primâ facie* good, remained so, he having no equity to set it aside.

The first corollary from that case, therefore, is that it

is necessary for a person impeaching a settlement to prove that at the time of its execution he was the then intended husband. He must show that the settlement was made during the course of the treaty for marriage with him (*m*). If this is so, and the woman during the treaty for marriage holds herself out as entitled to property, and then conveys or settles it without the knowledge or concurrence of the intended husband, actual fraud will be imputed to her, and the deed will be set aside in equity (*n*).

The principle has been carried in some cases farther than this. In *Godlard v. Snow* (*o*) there was no active deception of the intended husband, who was, it seems, not aware of the existence of her property. Yet a settlement of which he had not been informed was set aside after an interval of ten years, as being a fraud upon his marital right (*p*).

It has been questioned whether a meritorious consideration will suffice to support a settlement, notwithstanding concealment from an intended husband—for instance, the fact that the settlement has been made in favour of children of a former marriage. If such a settlement is made previous to a treaty for a second marriage it is doubtless good (*q*), but it seems that if made during the treaty for marriage, the fact of there being a provision for children will not render valid a settlement which would on other grounds be fraudulent (*r*).

2. *What circumstances will render the settlement valid.*

1. A transfer for valuable consideration to a purchaser without notice of any intended derogation of the marital right will be held good (*s*), and probably the purchaser's right would be sustained even if he acted with notice (*t*).

(*m*) *England v. Downs*, 2 Beav. 522.

(*n*) *Ibid.*; *Lance v. Norman*, 2 Ch. Rep. 79.

(*o*) 1 Russ. 485.

(*p*) *Downes v. Jennings*, 32 Beav. 290; *Taylor v. Pugh*, 1 Ha. 608.

(*q*) *King v. Cotton*, 2 P. Wms. 674.

(*r*) *Taylor v. Pugh*, *sup.*

(*s*) *Blanchet v. Foster*, 2 Ves. sr. 264; *Llewellyn v. Cobbold*, 1 Sm. & G. 376.

(*t*) *Ibid.*

2. If the husband knew of the gift or settlement during the treaty for marriage, although he may not have been informed of it by the intended wife, he will not be able to set it aside (*u*); much less if he concurs in it (*x*). If, moreover, after marriage he acquiesces in or confirms the settlement, he will not be allowed to dispute it (*y*). Mere delay in seeking relief, however, will not necessarily amount to acquiescence (*z*). Know-
ledge by
husband.

3. If the husband has before marriage seduced his intended wife, and so deprived her of her liberty of action, any settlement she may have made will be sustained against him (*a*). Seduction.

4. In the absence of any representation made as to specific property, there is no implied contract of the lady that her property shall be in no way diminished during the treaty for marriage. It is for the Court to determine whether, having regard to the position of the parties and the circumstances of the case, the transaction should be treated as fraudulent or not (*b*). Limits of
the prin-
ciple.

(*u*) *St. George v. Wake*, 1 My. & K. 610; *Ashton v. McDougall*, 5 Beav. 56.

(*x*) *Slocombe v. Glubb*, 2 Bro. C. C. 545.

(*y*) *Maber v. Hobbs*, 2 Y. & C. Ex.

317.

(*z*) *Downes v. Jennings*, *sup.*

(*a*) *Taylor v. Pugh*, *sup.*

(*b*) *De Mandeville v. Crompton*, 1 V. & B. 354; *Taylor v. Pugh*, *sup.*

CHAPTER VIII.

INFANTS.

I. *Guardianship.*

Eyre v. Countess of Shaftesbury.

1. *Obsolete species of Guardianship.*
2. *Guardianship of Parents.*
3. *Testamentary Guardians.*
4. *Guardians appointed by a Stranger.*
5. *Guardians appointed by the Court.*

II. *Maintenance.*

1. *Out of what Property directed.*
2. *In what circumstances.*

III. *Advancement.*

1. *Under a Power.*
2. *In absence of a Power.*

Note.—Jurisdiction as to Lunatics.

Guardian-
ship.

I. APART from statutory enactments, the Court of Chancery from the earliest times exercised a very beneficial jurisdiction over infants; and that jurisdiction has now been conferred upon the Chancery Division of the High Court of Justice (*a*). The greater part of the law respecting this subject relates to the incidents and characteristics of guardianship; the first and most important duty before us, therefore, is to enumerate the different species of

(*a*) 36 & 37 Vict. c. 66, s. 34.

guardians which are recognised in equity, and to ascertain the powers and responsibilities of each.

The fullest discussion of the subject is found in the leading case of

EYRE v. THE COUNTESS OF SHAFTESBURY

[2 P. Wms. 103; 2 W. & T. L. C. 633],

in which the whole jurisdiction of the Court in matters of guardianship was passed under elaborate review. We shall presently have to advert to the precise points raised and settled in this case; but before doing so there are some matters requiring consideration which were only incidentally referred to therein.

1. *Obsolete species of guardianship.*

At different periods of the history of equity, several species of guardianship were recognised which have now little more than an antiquarian interest. Some having been expressly abolished by statute, and others having fallen into desuetude, it is only necessary here to enumerate them: we refer to guardianship in chivalry, guardianship in socage, guardianship by the appointment of the Ecclesiastical Courts, guardianship by election and by custom, and guardianship under 4 & 5 Ph. & Mary, c. 8.

2. *The guardianship of parents.*

By nature and nurture the father is indisputably the guardian of his children (*b*), and he may exercise the rights of guardianship even in opposition to their mother (*c*). Until quite recently the Courts so respected this natural right as to refuse, save under very exceptional circumstances, to enforce a contract entered into by a father to give up to his wife the custody and education of their children (*d*), on the ground that it was opposed to public policy. But by 36 Vict. c. 12, it has been enacted that no agreement con-

Obsolete species of guardianship.

Guardianship of a father.

36 Vict. c. 12.

(*b*) *Exp. Hopkins*, 3 P. Wms. 152.

(*d*) *Hope v. H.*, 8 De G. M. & G. 731; *Swift v. S.*, 34 Beav. 266.

(*c*) *Exp. M'Clellan*, 1 Dowl. 81.

mother of an infant shall be held to be invalid by reason only of its providing that the father shall give up the custody or control of such infant to the mother, provided that no Court shall enforce such agreement if it shall be of opinion that it will not be for the benefit of the infant to do so.

But an agreement by a husband before marriage that his children shall be brought up in a particular religion is not binding on him, and will not be enforced (*e*), unless, indeed, he has abandoned his right to educate his children in his own religion (*f*).

Of mother. In case of the death of a father without his having appointed a testamentary guardian, the mother, if surviving, becomes the natural guardian of the children (*g*).

Court super-intends guardianship. Though no Court has power actually to deprive a father of his legal right as guardian, his exercise of his natural guardianship is subject to the superintendence of the Court, which will, if necessary, interfere between him and his children by appointing a person to act as guardian. This part of its jurisdiction was well established in the case of *Wellesley v. Beaufort* (*h*); but in order to justify such interference there must be strong circumstances showing that it will be for the benefit of the children.

When guardianship of father interfered with. Thus, prior to 36 Vict. c. 12, the mere fact of the father's poverty, or even insolvency, would not suffice (*i*); nor would acts amounting to severity or harshness, unless extreme, or of such a nature as to corrupt the morals of his children (*k*). Even where a father was living in adultery, but did not bring his children into contact with his paramour, the Court refused to deprive him of their custody (*l*).

Insolvency, desertion. But where, coupled with insolvency, the character of the father is bad (*m*), or he has deserted his children (*n*), or

(*e*) *Re Browne*, 2 Ir. Ch. R. 151.

(*f*) *Andrews v. Salt*, 8 Ch. 622, 637.

(*g*) *Villareal v. Mellish*, 2 Swanst. 533.

(*h*) 2 Russ. 1, 2 Bli. N. S. 124.

(*i*) *Kilpatrick v. K.*, Macph. 143;

In re Fynn, 2 De G. & Sm. 457.

(*k*) *Curtis v. C.*, 5 Jur. N. S. 1147; *Re Spence*, 2 Ph. 252.

(*l*) *Ball v. B.*, 2 Sim. 35.

(*m*) *Exp. Mountfort*, 15 Ves. 445.

(*n*) *Creuze v Hunter*, 2 Cox, 242.

is endangering their property or neglecting their education (o), there is sufficient ground for interference.

Even in the absence of any pecuniary difficulties of the father, if his habits are notoriously immoral, and such as are likely to corrupt his children, or imbue them with irreligious notions, the Court has not hesitated to remove them from his control (p). Habits of habitual drunkenness and profanity have led to the same result (q).

The power of the Court in this direction has been considerably and advantageously extended by statute. First, by 2 & 3 Vict. c. 54 (r), the Court was enabled to give to a mother access to her children, and even custody of them, up to the age of seven years, in case of ill-treatment by her husband. More recently this Act has been replaced by 36 Vict. c. 12, which empowers the Court upon petition of a mother by her next friend, to give her a right of access to any infant under sixteen years of age at such times and subject to such regulations as may seem proper, or to order that any such infant shall be delivered to the mother and remain under her custody and control until it shall attain that age, subject to such regulations as may seem proper. The principles upon which the Court administers this Act are expounded in *Re Taylor* (s).

Since by the Judicature Act the rules of equity as to the custody of infants now prevail in all divisions of the High Court, a father can no longer, as formerly, obtain at common law a writ of *habeas corpus* for the possession of a child, where there are equitable reasons against it (t).

3. Testamentary guardians.

By 12 Car. II. c. 24, power was conferred upon a father, even though a minor, of appointing by deed or will guardians for his legitimate children during minority.

(o) *Re England*, 1 R. & M. 499; *Thomas v. Roberts*, 3 De G. & Sm. 758.

(p) *Shelley v. Westbrook*, Jac. 266; *Wellesley v. Beaufort*, *sup.*

(q) *De Manneville v. De M.*, 10

Ves. 62.

(r) Commonly known as Talfourd's Act.

(s) 4 Ch. D. 157.

(t) *Re Goldsworthy*, 2 Q. B. D. 75.

Now, by 1 Vict. c. 26, a minor can no longer make an effectual will for any purpose; but the power of a minor to appoint a guardian by deed still remains. Under the earlier statute Roman Catholics could not be appointed guardians, but this disability, with others, has long been removed (*u*).

The statute conferred no corresponding power on a mother, and her natural guardianship is superseded by the father's testamentary appointment: the mother, however, may of course be appointed herself to the office.

How
appointed.

No particular form of words is required for the appointment of a testamentary guardian. Such expressions as "my son and daughter to be under the care and direction of A. and B." (*x*), and a direction to C. to "take the care and management of my children" (*y*), have been held sufficient. But where the words used refer only to the property of the children—*e.g.*, "to be guardian of the estate" of the children—they will not constitute a person a guardian (*z*). A person is not disqualified from being appointed guardian by being a witness to the will appointing him (*a*).

Passes by
survivor-
ship.

The leading case of *Eyre v. Shaftesbury* (*b*) decides that where more than one guardian is appointed by will the office passes to the survivor. A testator may, under the statute, give to the survivor the power of nominating a successor to one who has died (*c*); but guardianship is not assignable. *Delegatus non potest delegare* (*d*).

Dis-
claimer.

It is open to a testamentary guardian to disclaim the office before acting therein (*e*); but after acting in the office he cannot renounce it (*f*).

Testa-
mentary

A testamentary guardian is a trustee; so that the Statute

(*u*) 33 Geo. III. c. 21; 34 & 35 Vict. c. 48.

(*x*) *Bridges v. Hales*, Mos. 108.

(*y*) *Miller v. Harris*, 14 Sim. 540.

(*z*) *Re Norbury*, 9 I. R. Eq. 134.

(*a*) *Morgan v. Hatchell*, 19 Beav. 86.

(*b*) *Supra*, p. 387.

(*c*) *In the goods of Parnell*, 2 L. R. P. & D. 379.

(*d*) *Mellish v. De Costa*, 2 Atk. 14.

(*e*) *O'Keefe v. Casey*, 1 S. & L. 106.

(*f*) *Spencer v. Chesterfield*, Amb. 146.

of Limitations does not run in his favour in an account ^{guardian} between him and his ward (*g*). The claim of the ward ^{a trustee.} may, however, be lost by a long acquiescence in the acts of the guardian (*h*).

Testamentary guardianship is clearly not determined by ^{Office not} the marriage of a male ward (*i*), nor, it would seem, by the ^{deter-} marriage of a female ward (*k*). ^{mined by} ^{marriage} ^{of ward.}

The powers of a testamentary guardian are extensive. ^{Powers of} He is generally entitled to the custody of the persons of ^{guardian.} his wards (*l*); and unless some contrary wish is expressed by the father (*m*), he may regulate and superintend their education, and compel their obedience (*n*).

Parental guardianship being subject to the superintend- ^{Superin-} ence of the Court, *à fortiori* so also is a testamentary ^{tendence} guardian. It seems that there is no jurisdiction to remove ^{of the} such a guardian from his office; but under certain cir- ^{Court.} cumstances he may be suspended from exercising the powers thereof, and a proper person appointed to act in his place (*o*). And it requires less stringent circumstances to induce interference in this case than in that of a father.

Thus bankruptcy or insolvency will justify the appoint- ^{Bank-} ment of a person to take the place of a testamentary ^{ruptcy.} guardian (*p*); but the mere fact of a guardian having a pecuniary interest in the death of his ward, will not, as in Roman law, disqualify him for his office, or be a ground for superseding him (*q*).

In the superintendence of testamentary guardians by the Court there is an element to be considered which is wanting in the case of parental guardianship, namely, that the wishes of the father, both expressed and implied, are regarded with respect; but since in cases where ques-

(*g*) *Mathew v. Brise*, 14 Beav. 341.

(*h*) *Sleeman v. Wilson*, 13 Eq. 36.

(*i*) *Eyre v. Shaftesbury*, *sup.*

(*k*) *Roach v. Garvan*, 1 Ves. sr. 160.

(*l*) *Exp. E. of Ilchester*, 7 Ves. 381.

(*m*) *Knott v. Cottee*, 2 Ph. 192.

(*n*) *Hall v. II.*, 3 Atk. 721; *Tre- main's Ca.*, 1 Stra. 173.

(*o*) *Foster v. Denny*, 2 Ch. Ca. 327; 1 Eq. Ca. Ab. 260, pl. 3.

(*p*) *Smith v. Bate*, 2 Dick. 631; *Heysham v. H.*, 1 Cox, 179.

(*q*) *Morgan v. Dillon*, 9 Mod. 135.

tions as to these arise the principles applied are identical with those which regulate the conduct of guardians appointed by the Court itself, we shall, to avoid repetition, postpone their discussion until dealing with this last species of guardianship.

4. *Guardians appointed by a stranger.*

Guardians
appointed
by
strangers.
Waiver by
father.

The power of a stranger to appoint guardians of an infant during his father's life can only be derived through the waiver of his right by the father. One of the cases most frequently cited with reference to this is *Powel v. Cleaver* (*r*), where a testator gave considerable legacies to his sister, her husband, and their infant children, upon the express condition that his executor should be guardian of the children during minority. The father acquiesced in the arrangement, accepted the benefits conferred upon him, and received the maintenance provided for the children. Afterwards he wished to resume the guardianship himself. This was refused, as not being consistent with the interests of the children (*s*).

It is necessary in such cases that there should have been a voluntary waiver of his rights by the father. The Court will not interfere to compel him to do this simply because a stranger offers to maintain the children (*t*); and it is open to a father to rescind and abandon an agreement of this nature at any time before it has been acted upon so as to alter the status of the child (*u*).

Guardianship created in this manner is of course subject to the supervision of the Court, on the same principles as testamentary guardianship.

5. *Guardians appointed by the Court.*

Guardians
appointed
by the
Court.

Whatever may have been its origin, as to which there has been much learned dispute, it was a well established part of the jurisdiction of the Court of Chancery to appoint guardians of infants when necessary; and this

(*r*) 2 Bro. C. C. 499.

(*s*) See also *Colston v. Morris*, Jac. 257, n.; *Andrews v. Salt*, 8 Ch. 622, 640.

(*t*) *Lyons v. Blenkin*, Jac. 245, 264; *Re Fynn*, 2 De G. & S. 457.

(*u*) *Hill v. Gomme*, 1 Beav. 540; 5 My. & Cr. 680.

jurisdiction is now, as we have seen, vested in the Chancery Division of the High Court of Justice.

The jurisdiction arises whenever an action is commenced in Chancery relative to the estate or person of an infant, and none the less because the father or a testamentary guardian is alive (*x*); or if without suit an order for maintenance is made on summons in Chambers (*y*), or on a petition respecting money belonging to an infant paid into Court under the Trustee Relief Act (*z*). In all these cases an infant is said to become a ward of Court. But in order to the exercise of the jurisdiction there must be some property of the infant in its power (*a*); and thus when it is desired to make an infant a ward of Court it is usual to settle a sum of money or other property on him for the purpose (*b*).

When the jurisdiction arises.

Without any suit pending, and although the infant has no property, the Court may upon petition appoint a guardian under 4 Geo. IV. c. 76, s. 17, to give consent to a marriage (*c*), or make an order for the delivery of an infant to a person who has a right to its custody (*d*); or it may appoint a guardian of the person and estate of an infant; but an infant does not in any of these cases become a ward of Court.

Under 4 Geo. IV c. 76.

The Court will not ordinarily appoint a married woman to be a sole guardian (*e*). When two or more guardians are appointed by the Court, the office does not upon the death of one survive, as in the case of testamentary guardianship; there must be a new appointment (*f*).

Married woman not appointed alone.

Office does not survive.

In the appointment of a guardian the wishes of the father of the infant, if alive, are regarded, even in the case of natural children (*g*); and in their education, his wishes, whether expressed or implied, are usually followed. In

Father's wishes followed.

(*x*) *Butler v. Freeman*, Amb. 303.

(*y*) *Re Graham*, 10 Eq. 530.

(*z*) 1) & 11 Vict. c. 96; *Re Hodge's Sett.*, 3 K. & J. 213.

(*a*) *Wellesley v. Beauport*, 2 Russ. 21.

(*b*) *Re Lyons*, 22 L. T. N. S. 770.

(*c*) *Re Woolcombe*, 1 Madd. 313.

(*d*) *Re Spence*, 2 Ph. 247.

(*e*) *Re Kaye*, 1 Ch. 387.

(*f*) *Bradshaw v. B.*, 1 Russ. 528.

(*g*) *Peckham v. P.*, 2 Cox, 46.

the absence of a direction to the contrary, the Court presumes that he desires his children to be educated in his own religion (*h*). And it is immaterial that his religion is not that of the Established Church (*i*). No pecuniary benefit to the child will induce the Court to depart from the course of religious instruction pointed out by the father (*k*).

Change of religion discountenanced.

Where, however, children have been brought up in a particular religion until they have reached such an age as to have formed definite religious opinions, even though in opposition to the wishes of the father, the Court is very reluctant to interfere, because of the peril of unsettling the foundations of all faith by a compulsory change; and the Court has sometimes conversed with the infant to ascertain the extent of its knowledge and the character of such opinions as it has formed (*l*).

Wards not to be taken out of jurisdiction, save under special circumstances.

In general the Court will not allow its wards to be taken out of its jurisdiction (*m*); and if from special circumstances the removal is allowed, security will be required for their return (*n*), and the Court must be kept informed as to their whereabouts and treatment (*o*). The health of a ward (*p*), the desirability of children living with their parents (*q*), and the enlistment of a ward in the army (*r*), have been deemed sufficient grounds for permitting a temporary residence beyond the jurisdiction. To remove a ward from the jurisdiction without leave of the Court is a contempt which will be severely visited on the offender (*s*).

Guardians

The Court will appoint guardians of a foreign infant

(*h*) *Re Newbery*, 1 Eq. 431; 1 Ch. 263; *Hawksworth v. H.*, 6 Ch. 539.

(*i*) *Talbot v. Shrewsbury*, 4 My. & Cr. 672.

(*k*) *Ibid.*, 686.

(*l*) *Witty v. Marshall*, 1 Y. & C. Ch. 68; *Stourton v. S.*, 8 De G. M. & G. 760.

(*m*) *De Manneville v. De M.*, 10 Ves. 52.

(*n*) *Jeffrys v. Vanteswarstwarth*, Barn. Ch. R. 141; *Biggs v. Terry*, 1 My. & Cr. 675.

(*o*) *Anon*, Jac. 265, n.; *Logan v. Fairlie*, Jac. 193.

(*p*) *Wyndham v. W.*, 1 Kee. 467.

(*q*) *Lethem v. Hall*, 7 Sim. 141.

(*r*) *Rochford v. Hockman*, Kay, 308.

(*s*) *Ibid.*

resident within its jurisdiction, and this notwithstanding that guardians may have been already appointed in the child's own country (*t*); and though foreign guardians are eligible to be appointed, the Court usually prefers a person within its jurisdiction and control (*u*). The Court will give effect to the orders of foreign Courts with respect to such children, unless they conflict with our own jurisprudence. of foreign infant.

The Court reasonably acts with great circumspection and strictness respecting the marriage of its wards. Whether they be male or female, and whether or not they have parents or guardians living, it is necessary to apply to the Court for permission before their marriage can take place (*x*). To marry a female ward without such permission is a gross contempt of Court, and the husband, together with all persons aiding and abetting the marriage, are liable to imprisonment (*y*); ignorance of the fact that the infant is a ward does not excuse the contempt (*z*). Where there is reason to suspect an unauthorised marriage, the Court will, by injunction, restrain it, and interdict any communication between the ward and her suitor (*a*). Marriage of wards.

A guardian appointed by the Court is commonly required to give security that the ward under his care shall not marry without leave of the Court; and if he is suspected of any connivance at an unsanctioned intimacy, the ward will be removed from his care and custody and committed to the care of others (*b*). Guardian to give security.

When the Court grants leave for a marriage to take place, it is careful to see that a proper settlement of the ward's property is made; and to this end it will direct an inquiry in Chambers as to what settlement is proper (*c*). Marriage settlements.

(*t*) *Stuart v. M. of Butc*, 9 H. L. 440, 464; *Nugent v. Vetzera*, 2 Eq. 704.

(*u*) *Johnstone v. Beattie*, 10 Cl. & F. 42.

(*x*) *Smith v. S.*, 3 Atk. 305.

(*y*) *Wortham v. Pemberton*, 1 De G. & Sm. 644; *Exp. Mitchell*, 2

Atk. 173.

(*z*) *More v. M.*, 2 Atk. 157; *Herbert's Ca.*, 3 P. Wms. 116.

(*a*) *Pearce v. Crutchfield*, 14 Ves. 206.

(*b*) *Tombs v. Elers*, Dick. 88.

(*c*) *Smith v. S.*, *sup.*; *Leeds v. Barnardiston*, 4 Sim. 538.

The nature of the settlement depends upon many circumstances, such as the fortune, station, and conduct of the husband, and the extent of the property of the ward (*d*).

Where a marriage has taken place without the permission of the Court, the husband will be compelled to execute a proper settlement, and can only purge his contempt by doing so. Such a case will of course be treated more strictly against the husband than where he has acted openly; usually the settlement will entirely exclude the marital right and interest (*e*); but this rule has been relaxed where there has been no great difference in fortune between the parties (*f*) and where the husband has acted in ignorance (*g*).

Settlement
by female
ward on
majority.

When a female ward of Court comes of age, she may generally settle her property as she pleases; but the Court will so far retain her property as to see that her action is free (*h*). An improper settlement, though made after her attaining majority, may be rectified at her request (*i*), and this has been done after a considerable lapse of time (*k*). Where the Court has approved a settlement it will not allow its purpose to be defeated by the parties delaying the marriage until the lady is of age (*l*).

18 & 19
Vict. c. 43.

Previous to 18 & 19 Vict. c. 43, infants could not make binding settlements on their marriage, nor could the Court give validity to their settlements by adding its sanction (*m*). By that statute (explained by 23 & 24 Vict. c. 83), infants not being under 20 if male, or 17 if female, can now, with the approbation of the Court, make binding settlements of their real and personal estate in possession or otherwise on their marriage. This statute, however, does not empower the Court to make a settlement of an infant's property after marriage (*n*).

(*d*) *Ball v. Coutts*, 1 V. & B. 303;
Field v. Moore, 7 De G. M. & G. 691.

(*e*) *Wade v. Hopkinson*, 19 Beav.
613.

(*f*) *Ball v. Coutts*, *sup.*

(*g*) *Richardson v. Merrifield*, 4 De
G. & S. 161.

(*h*) *Austen v. Halsey*, 2 S. & S.
123, n.

(*i*) *Long v. L.*, 2 S. & S. 119.

(*k*) *Cave v. C.*, 15 Beav. 227.

(*l*) *Hobson v. Ferraby*, 2 Coll. 412.

(*m*) *Savill v. S.*, 2 Coll. 72.

(*n*) *Re Potter*, 7 Eq. 484.

II. Maintenance.

Another prominent feature in the jurisdiction of the Chancery Division of the High Court of Justice respecting infants is its power in certain cases to make provision for their maintenance out of the income of their property (*o*). The first question is out of what property maintenance can be directed; the second, in what circumstances it will be directed. Maintenance,

1. *Out of what property maintenance can be directed.* out of what directed.

(1.) The clearest case is where a fund is expressly given to a person for the maintenance of children. This may or may not be so done as to create a trust for the children: in the former case the person so receiving the fund is accountable for its proper application; in the latter he is not (*p*). It is a matter of course depending upon the language of each particular instrument whether there is a trust or not; but where the gift is made to a person who is already legally bound to maintain the children—for instance, to their father—it requires a strong case to establish it as a trust; the presumption is that it is intended to confer a beneficial interest (*q*). Express fund.

(2.) More commonly the *income* only of a fund is left for the maintenance of children: and in this case the person to whom it is so given is entitled to receive it as long as he continues properly to maintain them (*r*), and even though the language be such as to create a trust for maintenance, no account will be directed unless a special case is made out showing that some of the children have not been provided for (*s*). When some of the children originally comprised in such a gift have come of age, the whole fund remains applicable, if necessary, to the main- Income of express fund.

(*o*) *Wellesley v. W.*, 2 Bli. N. S. 133.

(*p*) *Andrews v. Partington*, 2 Cox, 223.

(*q*) *Byne v. Blackburn*, 26 Beav. 41.

(*r*) *Hadow v. H.*, 9 Sim. 438.

(*s*) *Hora v. H.*, 33 Beav. 88
Raikes v. Ward, 1 Ha. 450.

tenance of those who are still infants; but if this is not necessary, the shares of the adults may be paid them (*t*).

Under
powers.

(3.) It is usual in wills and settlements which confer property on infants, to insert powers for their maintenance; and under such powers trustees can safely apply either income or capital for that purpose, provided, of course, that their exercise of the power is *bonâ fide* and reasonable (*u*).

23 & 24
Vict. c.
145.

It having been found that hardship was often occasioned by the omission of such powers, a general power of applying an infant's property for his maintenance and education was given by Lord Cranworth's Act (*x*). And by 44 & 45 Vict. c. 41, s. 43, it is enacted, that where any property is held by trustees in trust for an infant, either for life or for any greater interest, and whether absolutely or contingently on his attaining the age of twenty-one years, or on the occurrence of any event previous to his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian (if any), or otherwise apply for or towards the infant's maintenance and education the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any other person bound by law to provide for the infant's maintenance or education, or not. This power may be excluded by the expression of a contrary intention in the instrument conferring the infant's interest, but the section applies whether the instrument comes into operation before or after the commencement of the Act.

44 & 45
Vict. c. 41,
s. 43.

Effects of
the statu-
tory power.

The power of maintenance given by the similar section in Lord Cranworth's Act has been held to extend only up to the age of twenty-one years (*z*); and that Act conferred no power to allow maintenance where the infant would not in any event become entitled to the income. Thus where a legacy was given to a child contingently on his attaining twenty-one, but the income was meanwhile to be

(*t*) *Berry v. Bryant*, 2 Dr. & Sm. 1.

(*u*) *Talbot v. Marshman*, 3 Ch. 622.

(*x*) 23 & 24 Vict. c. 145, s. 26.

(*z*) *Re Breed's Will*, 1 Ch. D. 228.

accumulated as part of the residuary personal estate, maintenance could not be allowed thereout, since the child was not even contingently entitled to the income (*a*). The wording of the present Act is, however, apparently wide enough to cover such a case, as the power is not, as before, restricted to income to which the infant may be entitled.

(4.) In the absence of any such power directory or statutory, the Court has been wont to allow as maintenance the rents, profits, or income of real or personal property which is vested in possession in an infant (*b*); and if it be so vested, maintenance may be allowed, notwithstanding that it is liable to be divested by a condition subsequent (*c*). Maintenance directed by the Court. Out of what fund.

Maintenance cannot usually be given out of a vested legacy payable at a future day, since it does not carry interest until that time (*d*); still less out of the income of a contingent legacy (*e*). But to these rules there is this important exception, namely, that if a parent or person *in loco parentis* leaves to a child or to children as a class a vested legacy payable *in futuro*, or a contingent legacy, and the child or children is or are otherwise unprovided for, the interest will be allowed as maintenance, from the death of the testator (*f*). But maintenance will not be so allowed if the testator has made an independent provision for it (*g*).

When there are equal legacies to a class of children, to be paid at 21, with survivorship to the others in case of the death of any under that age, the Court will, notwithstanding a direction to accumulate the interest, apply the interest for the maintenance of the whole class, if necessary (*h*); but it cannot do so if there is a gift over in certain events to a stranger (*i*), nor if the class comprises

(*a*) *Re George*, 5 Ch. D. 837.

(*b*) *Dormer v. D.*, Rep. t. Finch, 432; *Re Howarth*, 8 Ch. 415.

(*c*) *Taylor v. Johnson*, 2 P. Wms. 504.

(*d*) *Descrampes v. Tompkins*, 4 Bro. C. C. 149, n.; *Crickett v. Dolby*, 3 Ves. 10.

(*e*) *Butler v. Freeman*, 3 Atk. 58.

(*f*) *Inledon v. Northcote*, 3 Atk. 438; *Brown v. Temperley*, 3 Russ. 263.

(*g*) *Ibid.*

(*h*) *Marshall v. Holloway*, 2 Swanst. 436.

(*i*) *Exp. Keble*, 11 Ves. 604.

unborn children, who may thus become entitled to the whole (*k*).

The Court will only in extreme cases resort to or authorise the employment of an infant's capital for his maintenance (*m*).

2. *In what circumstances maintenance will be directed.*

When directed under the statute, discretion of trustees.

In both Lord Cranworth's Act (*n*) and 44 & 45 Vict. c. 41, the granting or withholding of maintenance is expressed to be "at the sole discretion" of the trustees; and it was decided that they might pay it to the infant's father, who as natural guardian was held to come within the words of the Act (*o*). The present Act expressly provides for such a case.

Apart from statute, maintenance not allowed to father.

In cases not within the Act, the Court has acted on the principle that the father is bound to maintain his children, and has accordingly refused to allow maintenance out of *their* property, except in cases where the father has been unable to provide for them in a manner suited to their fortune and position (*p*).

Exception; settled fund.

But if the property in question is the subject of a marriage settlement, the trusts of which are a matter of contract, then if the settlement contains a *trust* for maintenance, a father is entitled to receive a proper sum for the purpose, without reference to his ability (*q*). A mere *power* so to apply the income is not, however, sufficient to entitle the father to this (*r*).

Widow is entitled.

A married woman having separate estate is now legally liable for the maintenance of her children, and might therefore, perhaps, be considered to fall within the same rules (*s*); but a widow has been held entitled to maintenance for her children without reference to her ability, whether remaining unmarried (*t*), or marrying again (*u*).

(*k*) *Ibid.*; *Lomax v. L.*, 11 Ves. 48.

(*m*) *Davies v. Austin*, 1 Ves. jr. 247; *Walker v. Wetherell*, 6 Ves. 473; *Barlow v. Grant*, 1 Vern. 255.

(*n*) *Supra*, p. 398.

(*o*) *Re Cotton*, 1 Ch. D. 232.

(*p*) *Fawkner v. Watts*, 1 Atk. 408; *Mundy v. Howe*, 4 Bro. C. C. 224; *Thompson v. Griffin*, Cr. & Ph. 317.

(*q*) *Mundy v. Howe*, *sup.*; *Ransome v. Burgess*, 3 Eq. 773.

(*r*) *Ibid.*

(*s*) 33 & 34 Vict. c. 93, s. 14.

(*t*) *Lanoy v. D. of Athol*, 2 Atk. 447.

(*u*) *Greenwell v. G.*, 5 Ves. 194; *Douglas v. Andrews*, 12 Beav. 310.

In deciding as to the necessity for maintenance, and its amount, the Court will consider the state and condition of the whole family (*x*), as well as the circumstances of the parents (*y*), so as to enable an elder son to provide for his brothers and sisters, or a child to administer to the comforts and necessities of its father and mother.

In questions of future maintenance, of course the principal considerations are the extent of the fund and the position in life of the infant ; but whatever these may be, in allowing for past maintenance, only that which has been actually and properly expended will be repaid (*z*).

Condition of whole family considered.

Distinction between past and future maintenance.

III. *Advancement.*

For maintenance, as we have seen, the capital of an infant can rarely be resorted to. But in many cases it is evidently to his interest that his capital should to some extent, or even entirely, be laid out for the purpose of providing an occupation for him in the world. Such an application of capital is termed advancement, and is subject to rules quite different from those regulating payments for maintenance and education.

Advancement distinguished from maintenance.

1. *Where there is an express power of advancement.*

Very frequently the instrument conferring property on an infant contains a power expressly authorising advancement. Where this is the case the terms of the power must be strictly complied with (*a*), and if it prescribes the amount which may be so disposed of, that amount cannot be exceeded, unless, at least, the person to be advanced is absolutely entitled to the fund, or the persons entitled in default consent to the application (*b*). If the power is discretionary, the Court will not usually interfere in its

Under express power.

Power to be strictly followed.

(*x*) *Pierrepont v. Cheney*, 1 P. Wms. 493.

(*y*) *Roach v. Garvan*, 1 Ves. sr. 160.

(*z*) *Bruin v. Knott*, 1 Ph. 572.

(*a*) *Palmer v. Wakefield* 3 Beav. 227.

(*b*) *Therry v. Henderson*, 15 L. T. 452.

exercise (*c*), unless, indeed, the trustees wholly refuse to act or to exercise their discretion (*d*).

What comprised in advancement.

A wide construction is put upon the words "advancement or preferment." They have been held to warrant the purchase of a commission in the army (*e*), apprenticing in the mercantile navy (*f*), the making of marriage settlements (*g*), and payment of the expenses of emigration (*h*).

Limited power.

But if a power of advancement is given for a limited purpose—*e.g.*, to buy a commission in the army—and that purpose becomes impossible of execution, the power (differing in this from a bequest for a special purpose) cannot be exercised in any other way (*i*).

2. *Where there is no express power.*

Authority of Court required in absence of a power.

In the absence of an express power, trustees can only advance an infant at their own risk, since they will not be allowed the sum paid unless the Court approves (*k*). It is always, therefore, desirable in the first place to seek the authority of the Court.

The purposes for which the Court will authorise advancement are similar to those mentioned in the last section (*l*), and need no further illustration.

Out of what funds allowed.

As a rule, advancement can only be made out of a fund to which the infant is absolutely entitled, but it has been sanctioned in the case of equal legacies to a class with an equal chance of survivorship, after the analogy of maintenance under similar circumstances (*m*). Where, however, there is a limitation over to third parties, trustees can never safely, nor will the Court, break in upon the capital for any purpose, without the consent of those parties (*n*).

Advancement not

It being a father's duty to advance as well as to maintain his children, he will not be allowed to repay himself

(*c*) *Livesey v. Harding*, Taml. 460 ;
French v. Davidson, 396.

(*d*) *Lewis v. L.*, 1 Cox, 162.

(*e*) *Cope v. Wilmot*, 1 Coll. 396, n.

(*f*) *Warr v. W.*, Prec. Ch. 12, 13.

(*g*) *Lloyd v. Cocker*, 27 Beav. 645 ;
Roper-Curzon v. R., 11 Eq. 452.

(*h*) *Re Long*, 38 L. J. Ch. 125.

(*i*) *Re Ward's Tr.*, 7 Ch. 727.

(*k*) *Lee v. Brown*, 4 Ves. 362, 368.

(*l*) *Evans v. Massey*, 1 Y. & J. 196 ;
Franklin v. Green, 2 Vern. 137 ;
Walsh v. W., 1 Drew, 64.

(*m*) *Franklin v. Green*, *sup.*

(*n*) *Lee v. Brown*, *sup.* ; *Evans v. Massey*, *sup.*

what he has advanced, out of the property of his child (o); ^{allowed to father.} and it is doubtful whether the same would not apply to a mother (p); but an advancement will clearly be made for the child if the father is unable to do it (q).

NOTE.

Jurisdiction as to Lunatics.

This is a convenient place in which to mention a matter which does not, strictly speaking, fall within the limits of this work—namely, the jurisdiction exercised by the Lord Chancellor and Lords Justices over the persons and property of lunatics or persons of unsound mind.

The student cannot be too strongly reminded that this subject formed no part of the jurisdiction of the High Court of Chancery, nor is it now exercised by the Chancery Division of the High Court of Justice. The Crown, by virtue of its prerogative, has the right to assume the care and custody of the persons and estates of those who are of unsound mind. For the purpose of its exercise, the Crown by sign manual delegated its authority usually to the Lord Chancellor, as its highest judicial officer, not, however, *ex officio* as president of the High Court of Chancery. In 1851 the Lords Justices were appointed to constitute a Court of Appeal in Chancery, with all the original and other jurisdiction of the Lord Chancellor in the Court of Chancery (r); and shortly afterwards they were entrusted by a warrant under the Queen's sign manual with the care and custody of lunatics. On the passing of the Lunacy Regulation Act (s) in 1853 this jurisdiction was confirmed and continued concurrently with that of the Lord Chan-

Jurisdiction as to lunatics not in Chancery, but delegated by the Crown to the Lord Chancellor. Lords Justices.

16 & 17 Vict. c. 70.

(o) *Darley v. D.*, 3 Atk. 397.

(p) *Smee v. Martin*, Bunb. 136.

(q) *Exp. Hays*, 3 De G. J. & S.

485; *Re Lane*, 17 Jur. 219.

(r) 14 & 15 Vict. c. 83, s. 5.

(s) 16 & 17 Vict. c. 70.

cellor. By the Judicature Act, 1875 (*t*), s. 7, it is enacted that "Any jurisdiction usually vested in the Lords Justices of Appeal in Chancery, or either of them, in relation to the persons and estates of idiots, lunatics, and persons of unsound mind, shall be exercised by such judge or judges of the High Court of Justice or Court of Appeal as may be entrusted by the sign manual of Her Majesty or her successors, with the care and commitment of the custody of such persons and estates."

Thus from the earliest times down to the present, the jurisdiction in lunacy of certain judges appointed for that purpose by the Crown, has been and is something perfectly distinct from the jurisdiction of the Courts of Chancery or of the Chancery Division, and this distinction is illustrated by the fact that in matters of lunacy the appeal from the Lords Justices lies, not to the House of Lords, but to Her Majesty in Council, or, in other words, to the Judicial Committee of the Privy Council (*u*). If further illustration is required it is well afforded by the case of *Beall v. Smith* (*x*), where after the institution of a Chancery suit for the purpose of winding up the business of a person of unsound mind not so found by inquisition, an inquisition was granted on petition in lunacy, a verdict of lunacy obtained thereon, and a committee appointed. Further proceedings having been taken in the Chancery suit after this, it was held by the Lords Justices that all such proceedings should be set aside as a contempt upon the jurisdiction in lunacy.

Unsound-
ness of
mind does
not affect
jurisdic-
tion of
Chancery.

The fact, then, that a person is of unsound mind has no effect whatever on the jurisdiction of the Chancery Division. In itself it neither creates nor destroys any power to deal with such a person or his property. It follows that if our object is simply to inquire into the distinctive principles or procedure of the Court of Chancery as heretofore existing, or as now represented in the High

(*t*) 38 & 39 Vict. c. 77.
(*u*) Jud. Act 1873, s. 18.

(*x*) 9 Ch. 85.

Court of Justice, the question of lunacy or unsoundness of mind suggests nothing for our consideration. There is, however, this point to be observed, that when, on inquisition held at the direction of the Court in Lunacy, a verdict has been found, and a committee appointed, such committee becomes an officer of the Court, and as such a delegate of the prerogative of the Crown. From that time forward the affairs of the lunatic are under the direction of the Court of Lunacy; in it all proceedings respecting the lunatic's person or estate must be taken; and, as we have seen, the Courts of Chancery have then no longer power to interfere therewith, except under the direction of the judges in lunacy.

If inquiry be made as to the principles which guide the jurisdiction of the Court in cases of lunacy, the answer is very brief. The function of the Court is purely administrative, and the sole and constant aim and object of attention in the administration is the interest of the lunatic himself (*y*). In dealing with the lunatic's property, the Court will not suffer itself to be hampered by considering the interests of the real or personal representatives claiming through him; and if, as is elsewhere seen, a conversion is necessary for his interest, there is no equity as between the representatives giving a right on either side to claim a reconversion (*z*).

Court of
Lunacy
adminis-
trative.

It would be inappropriate here to enter into any examination of the practice of the administration in lunacy, such a subject being foreign to the scope and purpose of this work. Reference, however, may be made to the Act already mentioned (*a*) as being the foundation of the procedure as at present followed.

(*y*) *Oxenden v. Compton*, 2 Ves. jr. 72; *Exp. Phillips*, 19 Ves. 118.

(*z*) p. 428.

(*a*) 16 & 17 Vict. c. 70.

CHAPTER IX.

ELECTION, CONVERSION, SATISFACTION, AND PERFORMANCE.

IT is a matter of some difficulty to determine the proper place to assign to the subject-matter of this chapter in our classification. In some respects the doctrines of election, conversion, satisfaction, and performance might be conveniently treated under the heading of Administration; since it is almost exclusively in the working out of the administration of estates that the questions which they involve arise. With almost equal propriety they might have found a place under the heading of Trusts, since effect is generally given to them by the application of the theory of Trusts. But it would have greatly encumbered those subjects, already sufficiently comprehensive, to have added so much matter as is necessary for the proper elucidation of the doctrines now in view. On the whole, therefore, it has been thought best, though it may, perhaps, involve some sacrifice of logical precision, to assign a separate chapter to these peculiarly equitable principles. Their relation to the other branches of the subject which we have mentioned will be sufficiently manifest to prevent any confusion resulting from their isolated treatment; while the near relation of these matters *inter se* affords an additional warrant for presenting them to the reader in as close a connexion as possible.

SECTION I.—ELECTION.

I. *General Principle.*

Noys v. Mordaunt.

II. *Conditions of Election.*III. *Election under exercise of Powers.*IV. *Election as to Dower.*V. *Miscellaneous matters.*VI. *Mode of effecting Election.*VII. *Effects of Election.*

One of the most important cases by which the doctrine of election has been established is that of

NOYS v. MORDAUNT

[2 Vern. 581 ; 1 W. & T. L. C. 367],

in which the facts were as follows :—John Everard, having two daughters, made his will, devising to Margaret, his eldest daughter, his lands in Beeston and £800 in money ; to Mary, his second daughter, his lands in Stanborn and £1300 in money, provided and on condition that she released, conveyed, and assured Beeston lands to her sister Margaret. Provided, if he should have another daughter, then he gave the £800 devised to Margaret to such after-born daughter ; and the lands at Stanborn and the £1300 devised to Mary to the said Mary and such after-born daughter equally between them.

Another daughter, Elizabeth, was born shortly after his death. Mary married Higgs, and died without issue, without having given any release to Margaret, as required by the will.

Elizabeth claimed not only the lands devised to her by the will, and a moiety of what was devised to Mary, but

also a moiety of the Beeston lands devised to Margaret, these having been, on the testator's marriage, settled on himself for life, and his wife for her jointure, and to the first and other sons, and in default of issue to the heirs of his body. The question was whether she should be at liberty so to do, or ought not either to acquiesce in the will, or renounce any benefit thereby.

Lord Keeper Cowper said that in all cases of this kind, where a man is disposing of his estate amongst his children, and gives to one fee simple lands, and to another lands entailed or under settlement, it is upon an implied condition that each party quit and release the other.

I. *General Principle.*

Illustration.

1. The simplest illustration of the well-known equitable principle of election may be given in the following form :— If A. gives to B. by will or deed property belonging to C., and by the same instrument gives to C. property belonging to himself, then a Court of equity will allow C. to take the gift made to him by A. only upon the condition of his conforming to the instrument by giving up his own property to B. He must choose or elect whether he will keep his own property and forego the gift, or will accept the gift and give effect to the benefit intended for B. by giving up his property.

Contrast of English and Roman doctrine.

2. This doctrine rests on the ground that it is inequitable for a beneficiary at the same time to receive a benefit from a donor and refuse to give effect as far as possible to the donor's manifest intention. The limitations to which it is subject in application will presently be seen. In two important particulars the English doctrine of election differs from the corresponding principle in Roman law from which it is probably derived. First, whereas the Roman prætors only applied it in the case of testamentary

dispositions, in English Courts of equity it affects equally dispositions by will and dispositions by deed *inter vivos* (a). Secondly, no case of election arose in Roman law where a testator made a bequest of the property of a person under the erroneous supposition that it belonged to himself. Such a bequest was considered void, and the property so referred to might be retained by the person whose it was, while at the same time he received a benefit under the same will. In English equity, however, it is immaterial whether a donor intentionally or under a misapprehension affects to give away property belonging to another person. In either case the person whose property is thus dealt with must conform to the instrument if he would receive a benefit under it (b). This may perhaps be less logically consistent than the Roman rule, but it has the manifest advantage of avoiding the necessity of an inquiry, which is often likely to be exceedingly difficult, as to the degree of knowledge existing in the mind of the donor.

3. If in circumstances which give rise to the doctrine of election, the beneficiary elects to conform to the instrument and part with his own property, no question arises. But it is of course quite open to him to elect against an instrument which can have no intrinsic power to deprive him of what is his own. It was for some time a question what was the consequence of such an election. In many cases it has been held that by refusing to comply with the donor's expressed intention, a person entirely forfeits the benefit which the donor conditionally bestowed upon him (c). On the contrary, the well-known case of *Streatfield v. Streatfield* (d), followed by a long line of authorities, may be taken now to have established that forfeiture does not result from such non-compliance, and that all that is required from the beneficiary is to make or allow compen-

Compensation, not forfeiture, the rule.

(a) *Llewellyn v. Mackworth*, Barn. Ch. 445; *Green v. G.*, 2 Mer. 86.

(b) *Whistler v. Webster*, 2 Ves. 370.

(c) *Cowper v. Scott*, 3 P. Wms. 124; *Cookes v. Hellier*, 1 Ves. sr. 235.

(d) *Ca. t. Talb.* 176.

sation to the person who is disappointed by his election (*e*). Illustration will, perhaps, make this clearer. If, then, A. gives to B. an estate which belongs to C. and is worth £10,000, and at the same time gives to C. a legacy of £20,000, C. by refusing to part with his estate will not forfeit the whole of his legacy, but may receive £10,000 thereof, the remaining £10,000 being paid to B. as a compensation for his disappointment in not receiving the estate which was intended for him. The result of the cases has been thus summed up:—

“Firstly: In the event of election to take against the instrument, Courts of equity assume jurisdiction to sequester the benefit intended for the refractory donee, in order to secure compensation for those whom his election disappoints.”

“Secondly: The surplus after compensation does not devolve as undisposed of, but is restored to the donee, the purpose being satisfied for which alone the Court controlled his legal right” (*f*).

II. *Conditions of Election.*

Such being the general character of the doctrine, it is now necessary to examine more minutely what circumstances are necessary in order to call it into operation, or to justify its application.

1. There must appear in the instrument itself a clear intention on the part of the donor to dispose of what is not his own (*g*); and, as has been mentioned, if there is such a clear intention, it is immaterial whether he knew the property not to be his own, or erroneously conceived it to be so (*h*).

(*e*) *Gretton v. Haward*, 1 Swanst. 433; *Padbury v. Clarke*, 2 Mac. & G. 298; *Rogers v. Jones*, 3 Ch. D. 688.

(*f*) *Gretton v. Haward*, *sup.*

(*g*) *Forrester v. Cotton*, 1 Eden,

531; *Dillon v. Parker*, 1 Swanst. 359; *Jac.* 505.

(*h*) *Thelluson v. Woodford*, 13 Ves. 221; *Coutts v. Ackworth*, 9 Eq. 519.

There is often, however, considerable difficulty in ascer- ^{Where} taining precisely what the intention of the instrument is. ^{testator} Thus if a testator has a partial interest in the property ^{has a} dealt with, it will often be doubtful whether his language ^{partial} is designed to refer to the whole property, and so to affect ^{interest.} the interest of another person, or whether it is to be confined to his own partial interest only. In these circumstances the general tendency of the Court is to consider the words as applying only to his own actual interest, and, therefore, against the supposition of an intended election (*i*); but if there is shown a clear intention to pass the entirety, effect will be given to it; and if the owner of the other part takes other benefits by the will, he will be put to his election (*k*).

Again, a mere general devise or bequest will only com- ^{General} prehend property of which the devisor is owner, and ^{devise not} extrinsic evidence is not admissible to show that a testator ^{extended} considered property to be his own which was not so, and ^{by ex-} thus intended to comprise it in his general devise or ^{trinsic} bequest (*l*). But the will itself may show such an inten- ^{evidence ;} tion to include in a general expression property not his ^{but may} own as to give rise to a case of election. Thus an heir ^{by intrinsic} in tail has been put to his election by a devise which ^{evidence.} included an estate tail (*m*), the words used being "all my real estates" and "all the lands occupied by me." "If," said Sir John Romilly, in that case, "a testator says, 'I give all the property I have in the world to A. B.,' and he leaves a large legacy to his heir in tail, that will not raise a case of election against such heir, because that testator only gives what he has;" but it is otherwise when "there is an intention shown on the face of the will to dispose of the entailed estate away from the heir in tail."

(i) *Maddison v. Chapman*, 1 J. & H. 470; *Re Bidwell's Settmt.* 11 W. R. 161.

(k) *Padbury v. Clark*, *sup.*; *Wilkinson v. Dent*, 6 Ch. 339.

(l) *Blake v. Bunbury*, 1 Ves. 523; *Stratton v. Best*, 1 Ves. jr. 285; *Clementson v. Gandy*, 1 Kee. 309.

(m) *Honywood v. Forster*, 30 Beav. 14.

There must be a fund available for compensation.

2. As the doctrine of election depends upon compensation, it will not be applicable unless there be an available fund from which compensation can be made. In other words, there will be no ground for election unless the testator or settlor bestows some property actually and absolutely his own on the person who is required to elect.

Appointments under powers.

This limitation of the principle is most frequently illustrated by cases in which benefits are conferred by the exercise of powers of appointment. A fund over which a person has a mere power of appointment, there being a gift over on default of the exercise of the power, is not the absolute property of the donee of the power. Therefore where a person under a power to appoint among children made an appointment contrary to the terms of the power, a child entitled in default of appointment was allowed to set it aside, notwithstanding that a share had been by the same instrument appointed to him (*n*). He was not required to elect, because there was no free disposable property of the appointor given to him which could be laid hold of to compensate the person disappointed. So where a testator had an exclusive power of appointment over an estate to his children and grandchildren, and an exclusive power to appoint a fund to his children only, and he appointed the estate to some of his children, and the fund to his children *and a grandchild*, the children were not called upon to elect in favour of the grandchild, the appointment to whom was *ultra vires*; no property of the testator's own having been given to them by the will (*o*).

No election between two claims arising under the same instrument.

3. There is no case for election between two or more separate dispositions contained in one instrument. In other words, election only applies between a gift given by some instrument, and a claim *dehors* that instrument. Thus a testatrix who had a power to appoint a fund in

(*n*) *Bristowe v. Ward*, 2 Ves. 336.

(*o*) *In re Fowler's Trust*, 27 Beav. 362.

favour of her children, appointed by her will a portion thereof to her son for life, with remainder as he should by will appoint; and there followed a general residuary appointment of the settled fund, subject to all other appointments, to her daughters, to whom benefits out of the testatrix's own property were at the same time given. It was held that the appointment in favour of the appointees of the son was void for remoteness. That portion, therefore, passed under the residuary appointment to the daughters. It was then argued that as the daughters received independent gifts from the testatrix, the appointees of the son could put them to their election between such gifts and the fund accruing to them in consequence of the previous decision; but it was decided that there was no case for election, both claims arising from the same instrument (*p*).

On a similar principle, a person to whom by the same will a beneficial and an onerous bequest or devise are made, is not required to elect whether he will accept both or neither. He may, if he pleases, accept the benefit and reject the burden (*q*), unless, indeed, the will shows a clear intention that the acceptance of the burden should be a condition of receiving the benefit (*r*).

4. Election only applies to cases of bounty, not to cases of debt. If, therefore, there is a devise to creditors for the payment of their debts, they can accept the benefit of it without any prejudice to their legal rights against other funds disposed of by the will (*s*). Such was the law before real property was liable to all debts. Since 3 & 4 Will. IV. c. 104, general creditors having a right to proceed against all the property of the deceased, such questions can rarely arise.

The principle of election is in itself sufficiently simple and clear, but its application in the ever varying circum-

(*p*) *Wollaston v. King*, 8 Eq. 165;
Wallinger v. W., 9 Eq. 301.

(*q*) *Andrew v. Trinity Hall*, 9 Ves.
525.

(*r*) *Warren v. Rudall*, 1 J. & H.
13.

(*s*) *Kidney v. Coussmaker*, 12 Ves.
136; *Deg v. D.*, 2 P. Wms. 412.

Beneficial
and one-
rous be-
quests.

Election
not applic-
able to
debts.

stances of practice often involves questions of considerable difficulty. It is only possible here to add as a further illustration some notice of the leading classes of cases on which discussion has taken place.

III. *Election arising from the exercise of Powers.*

Appoint-
ment *ultra*
vires and
gift to
person
entitled in
default.

1. We have already seen that no election is necessitated by an improper appointment under a power, where no free disposable property of the donor of the power is at the same time bestowed. If, however, an appointment is made to a person who is not an object of the power, and at the same time a gift of the donor's property is made to a person entitled in default of appointment, the principle of election applies. Here, the appointment itself being invalid, the property would naturally pass as if there had been no appointment, to the person entitled in default. But since an independent benefit has been conferred upon him by the same instrument, the conditions upon which the principle of election rests are precisely complied with; and he must either conform to the instrument by giving up his title to the appointed property, or if he insists on that, he will not be suffered to receive the gift conferred upon him (*t*).

Appoint-
ment with
direction
to transfer
or attempts
to modify.

2. But it will not suffice to raise a case of election, if after appointing to persons who are objects of the power, and at the same time giving them property of his own, the appointor directs them to settle the property on persons who are not objects of the power (*u*). In short, where there is an absolute appointment to an object of the power, followed by attempts to modify the interest so appointed in a manner which the law will not allow, the Court reads the instrument just as if such attempts had

(*t*) *Whistler v. Webster*, 2 Ves. jr. 367.

(*u*) *Carver v. Bowles*, 2 R. & M. 304; *Churchill v. C.*, 5 Eq. 44.

not been made (*x*). *A fortiori* merely precatory words, requesting appointees, objects of the power, to leave the fund appointed to others not objects of the power, will not put them to their election (*y*). A clause of forfeiture on non-compliance may, however, suffice to necessitate election (*z*).

3. If the donee of a power by the same instrument appoints to a stranger, and confers benefits out of his own property upon an object of the power, the position is different from that in which the appointment is made to the person entitled in default of appointment. The appointment being invalid, the property passes to the person entitled in default of appointment. He cannot be required to elect, because no gift of the appointor's property is made to him. Nor, it seems, can the object of the power be required to elect, because no part of the property subject to the appointment comes to him. It is, indeed, laid down in *Blacket v. Lamb* (*a*) that such an appointment would give rise to election; but it is submitted that this cannot be so, since the two funds in question never come to the same hand at all. Of course, if the same person is both object of the power and entitled in default of appointment, the case falls within the principle of *Whistler v. Webster* (*b*), already discussed, and he must elect between the gift and the fund which comes to him in consequence of the invalidity of the appointment.

4. If the donee of a non-exclusive power of appointment among a class (to whom the property was limited in default of appointment) appointed exclusively to one object, and by the same instrument conferred benefits on the others out of his own property, the latter were formerly put to their election (*c*). Now, by 37 & 38 Vict. c. 37, however, such an appointment is valid, and the question cannot arise (*d*).

Appointment *ultra vires* and gift to object of power.

(*x*) *Woolridge v. W.*, John. 63.
 (*y*) *Blacket v. Lamb*, 14 Beav. 482;
Langslow v. L., 21 Beav. 552.
 (*z*) *King v. K.*, 15 Ir. Ch. R. 479;
Boughton v. B., 2 Ves. sr. 12.

(*a*) *Sup.*
 (*b*) *Sup.*
 (*c*) Sugd. Pow. 579; *Wollen v. Tanner*, 5 Ves. 218.
 (*d*) See p. 175.

5. Where there is an attempt by the instrumentality of a power to transgress the policy of the law—for instance, to evade the rule against perpetuities—the Court will not aid such an attempt by applying the doctrine of election (*e*).

IV. *Election with reference to Dower.*

Express words requiring election.

1. At law a widow might by express words be put to her election between her dower and a gift conferred upon her by will (*f*). In equity she may be put to her election by manifest implication, showing an intention of the donor to exclude her from dower (*g*). The principal questions which have arisen in this subject have been as to what amounts to a sufficient indication of intention to bar the legal right to dower.

Devise of part of dower lands, &c.

2. It has been decided, where the widow was married before 1834, that a devise to a widow of part of the lands of which she is dowerable was not inconsistent to her claim to dower in the remainder (*h*). Nor is a devise upon trust for sale of lands subject to dower sufficient to show an intention against her right, even though the interest of a part of the proceeds of sale is given to her (*i*); and it is immaterial that in such a case there is a direction that the rents and profits are in the meantime to be applied in the same way as the income to arise from the produce of the sale (*k*). Nor is a gift by the husband to the widow of an annuity or rent-charge charged upon such lands so inconsistent with her claim to dower as to put her to her election (*l*).

Mode of enjoyment prescribed

On the other hand, where wills have contained provisions which prescribed a mode of enjoyment inconsistent with the exercise of dower rights, these have

(<i>e</i>) <i>Wollaston v. King</i> , 8 Eq. 165.	W. 94, 103.
(<i>f</i>) <i>Gosling v. Warburton</i> , Cro. Eliz. 128; <i>Nottley v. Palmer</i> , 2 Drew, 93.	(<i>h</i>) <i>Lawrence v. L.</i> , 2 Vern. 365.
(<i>g</i>) <i>Birmingham v. Kirwan</i> , 2 S. & L. 452; <i>Hall v. Hill</i> , 1 Dr. &	(<i>i</i>) <i>Ellis v. Lewis</i> , 3 Ha. 310.
	(<i>k</i>) <i>Gibson v. G.</i> , 1 Drew, 42, 57.
	(<i>l</i>) <i>Holdich v. H.</i> , 2 Y. & C. C. C. 19; <i>Harrison v. H.</i> , 1 Keen, 765.

been held sufficient to show an intention that the widow should forego her dower, and thus to put her to her election. For instance, a power of leasing given to persons other than the widow sufficed to necessitate election (*m*). The same effect was ascribed to a devise of a farm to trustees with a direction for them to carry on the business, or let it on lease (*n*): so where the widow has been directed to pay rent for and not to aliene lands legally subject to dower (*o*), and where occupation by persons other than the widow has been directed (*p*), and where there was a direction to cut down timber on the estate (*q*). This last case refers, indeed, to freebench, which is, however, in this respect subject to the same principles as dower.

3. Since the Dower Act, 1834 (*r*), came into operation, cases as to election respecting dower have naturally become of less frequent occurrence, dower being now much more easily barred than previously. Thus by sect. 9 thereof a devise of the land is, in the absence of indication of contrary intention, sufficient to bar dower (*s*). A gift of personality, however, made to the widow, or of any land not subject to dower, will not prejudice her right unless a contrary intention is declared (*t*).

V. Miscellaneous Cases.

1. Although under the old law a devise to the heir was in a sense inoperative, inasmuch as he was held still to take by descent, and not by purchase as devisee, the leading case of *Noys v. Mordaunt* (*u*) decided that such a devise was a sufficient gift to raise a case of election between such

(*m*) *O'Hara v. Chaine*, 1 J. & H. 662.

(*n*) *Butcher v. Kemp*, 5 Mad. 61.

(*o*) *Birmingham v. Kirwan*, 2 S. & L. 444.

(*p*) *Miall v. Brain*, 4 Madd. 119; *Roadley v. Dixon*, 3 Russ. 192.

(*q*) *Thompson v. Burra*, 16 Eq. 592.

(*r*) 3 & 4 Will. IV. c. 105.

(*s*) See *Rowland v. Cuthbertson*, 8 Eq. 466; *Lacey v. Hill*, 19 Eq. 346.

(*t*) s. 10.

(*u*) *Supra*, p. 407.

property and other gifts conferred by the will, and this decision was consistently followed until by 3 & 4 Will. IV. c. 106 it was enacted that such devises should cause the land to pass to the heir as a purchaser. Since this statute there is, *a fortiori*, a necessity for election under such devises (*v*).

Imperfect
wills.

2. Where there is a want of capacity to make an effectual will, effect will not be given to an invalid disposition by applying the doctrine of election; unless, indeed, the alternative gift is made by way of express condition.

Thus, prior to the Wills' Act (*x*), when an infant whose will was valid as to personalty, but invalid as to real estate, gave a legacy to his heir-at-law, and devised his real estate to another person, the heir was not required to elect (*y*).

3. Again, where a testator prior to the Wills' Act, by a will valid as to personalty, but not sufficiently attested to devise freeholds, gave to his heir a legacy, and purported to devise the real estate to another, the heir was not required to elect, but might at the same time take the legacy and claim the real estate (*z*). If, however, the bequest was made conditional upon compliance with the devise, election was required (*u*). And in a case in which a testator purported to devise after-acquired property away from his heir, and at the same time left him a legacy, he was required to elect (*b*).

But since 1 Vict. c. 26, which remodels the whole law of wills, making the mode of attestation uniform as to both realty and personalty, and giving power to effectually devise after-acquired property, such cases can no longer occur.

An heir of heritable property in Scotland, who becomes entitled to it on account of the invalidity of a will accord-

(*v*) *Schroder v. S.*, Kay, 578.

(*x*) 1 Vict. c. 26.

(*y*) *Hearle v. Greenbank*, 1 Atk.
715.

(*z*) *Sheddon v. Goodrich*, 8 Ves,

481; *Gardiner v. Fell*, 1 J. & W.
22.

(*a*) *Boughton v. B.*, 2 Ves. sr. 12.

(*b*) *Thelluson v. Woodford*, 13 Ves,

209.

ing to the solemnities required by Scotch law, and who takes by the same will real or personal property in this country, will be required to elect (c).

Where there is incapacity to make a will owing to coverture, as where a married woman makes a valid appointment by will to her husband, affecting at the same time to bequeath to another a fund not included in the power, there is no case for election, and the husband is entitled to take the bequeathed fund *jure mariti*, without foregoing the benefit of the appointment (d).

4. A person is not obliged to elect between benefits conferred upon him by an instrument, and an interest which he takes derivatively from another who has elected to take in opposition to the instrument. Thus where a wife had elected to retain an estate tail against a will, which conferred benefits upon her husband, the husband was held entitled to curtesy in the estate (e). Nor is election required where a benefit is conferred by an instrument, and the recipient at the same time claims against the instrument but derivatively from the real owner, who received no benefit therefrom; for instance, where a gift is made to a husband in his own right, and his adverse claim is made as representative of his wife (f).

5. Where special directions are given as to election, it may be confined to particular gifts, so as to prevent election as to other parts of the instrument. Thus in *East v. Cook* (g) a testator devised property belonging to his eldest son to his second son, and amongst other gifts to the eldest son he gave him a piece of property which he stated to be in lieu of the piece of property which he purported to take away from him. The eldest son was held to be put to his election only as to those two pieces of property, so that he

(c) *Brodie v. Barry*, 2 V. & B. 127; *Orrell v. O.*, 6 Ch. 302.

(d) *Rich v. Cockell*, 9 Ves. 369.

(e) *Caran v. Pulteney*, 2 Ves. 544;
3 *ib.* 384.

(f) *Grissell v. Swinhoe*, 7 Eq. 291;
but see *Cooper v. C.*, 6 Ch. 21; 7
L. R. H. L. 53.

(g) 2 Ves. sr. 30.

might retain his own without foregoing the other benefits conferred by the will (*h*).

Devise to
co-owner.

6. If a testator who has an undivided interest in a particular property devises that property specifically to his co-owner, the devisee must elect between his interest in the property and the interest he takes under the will. General words, however, would, as we have seen, be taken to apply only to the testator's own interest, and would not necessitate an election (*i*).

VI. Mode of effecting Election.

Account
may be
required.

1. Persons who are put to their election are entitled to ascertain the respective values of their own property and of that conferred upon them, and may commence an action to have all requisite accounts taken (*j*). If, however, a cause relative to the same matter is already in existence, the necessary inquiries may be directed therein without the initiation of fresh proceedings (*k*). An election made under a mistake or in ignorance will not be binding (*l*).

2. Special rules apply to cases of election by persons under disability.

Election
by infants.

Where an infant is required to elect, one of two courses is open. The election may, as in *Streatfield v. Streatfield* (*m*), be deferred until the attainment of full age. Or there may be an immediate reference to Chambers to inquire what course would be most beneficial to the infant (*n*). Sometimes an order has been made without such reference (*o*).

Married
women.

The practice, also, as to election by married women has not been uniform. Usually an inquiry has been directed as

(*h*) See *Wilkinson v. Dent*, 6 Ch. 339, 341.

(*i*) *Miller v. Thurgood*, 33 Beav. 496.

(*j*) *Buttricke v. Broadhurst*, 3 Bro. C. C. 88.

(*k*) *Douglas v. D.*, 12 Eq. 617.

(*l*) *Pusey v. Desbourrie*, 3 P. Wms. 315; *Wake v. W.*, 3 Bro. C. C. 255.

(*m*) *Ca. t. Talb.* 176.

(*n*) *Bigland v. Huddleston*, 3 Bro. C. C. 285, n.; *Ashburnham v. A.*, 13 Jur. 1111.

(*o*) *Lamb v. L.*, 5 W. R. 772.

to what course is most beneficial, and they are required to elect within a limited time after the report (*p*).

3. Election may be implied from circumstances, and there is often much difficulty in deciding as to what acts will amount to implied election. As we have seen, any such acts, to be binding on a person who is required to elect, must be done with a knowledge of his rights. They must also be done with a knowledge of the right to elect (*q*), and with an intention of electing (*r*). Mere continuance in receipt of the rents and profits of, or the exercise of acts of ownership over, both properties, by a person who has not been called upon to elect, cannot evidently be construed into an election to take one and reject the other (*s*). Implied election.

Acquiescence in the enjoyment of one of the properties by other persons may be so long continued as to render it inequitable to disturb them on a plea of ignorance of rights (*t*); but no precise rule can be laid down to limit such time (*u*). Acquiescence.

Where a specific time has, as in *Streatfield v. Streatfield* (*v*), been limited for election, a person who does not elect within such time will be deemed to have elected against the instrument. Time.

VII. *The effects of Election.*

1. Election, whether expressed or implied, by a person *sui juris* and absolutely entitled, of course binds all who claim under him as well as himself. The election, however, of a person having a limited interest, will not bind others who are entitled in remainder (*w*), and each of the successive remainder-men has a separate right of election (*x*). Whom election binds generally.

(*p*) *Davis v. Page*, 9 Ves. 350;
Wilson v. Townsend, 2 Ves. 693.

(*q*) *Briscoe v. B.*, 7 Ir. Eq. R. 123;
1 J. & L. 334.

(*r*) *Stratford v. Powell*, 1 Ball. & B. 1; *Dillon v. Parker*, 1 Swanst. 380, 387.

(*s*) *Padbury v. Clark*, 2 Mac. & J. 298.

(*t*) *Tibbits v. T.*, 19 Ves. 663;
Dewar v. Maitland, 2 Eq. 834.

(*u*) See *Wake v. W.*, *sup.*; *Sopwith v. Maugham*, 30 Beav. 235.

(*v*) *Sup.*

(*w*) *Ward v. Baugh*, 4 Ves. 623;
E. of Northumberland v. E. of Aylesford, Amb. 540, 657.

(*x*) 1 Swanst. 408, n.

Similarly each member of a class—for instance, next of kin—has a distinct right to elect; the majority cannot bind anyone (*y*).

Election
by married
woman.

2. Election by a married woman binds both her real and personal estate in the hands of her heirs and representatives (*z*), and may be effected without deed acknowledged (*a*). Where she has so elected the Court can order a conveyance to be made accordingly (*b*). Prior to 20 & 21 Vict. c. 57, a married woman could not elect to relinquish a reversionary interest in personalty (*c*), but there seems to be now no reason why such a restriction should continue to exist. She could not, until recently, elect to part with property which is subject to a restraint on anticipation (*d*). Now the Court has power to dispense with the restraint with her consent, when it appears to be for her benefit to do so (*e*).

(*y*) *Fytche v. F.*, 7 Eq. 494.

(*z*) *Ardesoife v. Bennet*, 2 Dick. 463.

(*a*) *Barrow v. B.*, 4 K. & J. 409.

(*b*) *Ibid.*

(*c*) *Robinson v. Wheelwright*, 6 De G. M. & G. 535, 546.

(*d*) *Ibid.*, *supra*, p. 353.

(*e*) 44 & 45 Vict. c. 41, s. 39.

SECTION II.—CONVERSION AND RECONVERSION.

CONVERSION.

*General Principle.**Fletcher v. Ashburner.*

- I. *How effected.*
- II. *Effects of Conversion.*
- III. *Time from which Conversion takes place.*
- IV. *Effects of failure of purposes of Conversion.*
Ackroyd v. Smithson.
- V. *Character of resulting property.*

RECONVERSION.

General Principles.

1. *Persons electing must be sui juris.*
2. *Election does not affect interests of others.*
3. *What amounts to election.*

CONVERSION.

It is a familiar maxim that equity looks upon that as done which ought to have been done. There is no better illustration of the meaning of this than that supplied by the equitable doctrine of conversion, which is thus expressed by Sir Thomas Sewell in the leading case of

FLETCHER v. ASHBURNER

[1 Bro. C. C. 497 ; 1 W. & T. L. C. 896]:—

“Money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this in whatever

manner the direction may be given—whether by will, by way of contract, marriage articles, settlement, or otherwise—and whether the money is actually deposited, or only covenanted to be paid; whether the land is actually conveyed, or only agreed to be conveyed. The owner of the fund or the contracting parties may make land money or money land.” These words are quoted and supported by Lord Alvanley in *Wheldale v. Partridge* (e).

The consequences of this doctrine are of very great interest and importance, and being often not a little intricate, they require full and careful consideration. The first inquiry naturally is, how conversion may be effected.

I. *Conversion, how effected.*

Conversion may arise either from the intention of the owner of the property in question, or by the act of the Court or of third persons.

1. *Conversion arising by intention of the owner.*

Conversion by express intention.

The intention to effect a conversion may be either express or implied. An express direction needs no special consideration; and the leading case already quoted sufficiently illustrates the rule that a direction in a deed or will for the conversion of land into money or money into land will have the effect of impressing upon the property in equity the changed form intended.

Implied intention

must be clear.

It has also been decided that even without express direction conversion may be effected by a clear indication of intention—as, for instance, where a testator gives real estate together with personal estate to be divided into equal shares, and directs some of such shares to be invested in government funds (f). The intention must, however, be clearly apparent; mere ambiguous language will not suffice (g).

(e) 5 Ves. 388, 396.

(f) *Mower v. Orr*, 7 Ha. 475.

(g) *Cornick v. Pearce*, 7 Ha. 477.

Difficulty is often occasioned by the use of expressions which give to trustees an optional power of sale or investment. Generally speaking no conversion is effected unless the language is imperative. Thus a gift of money upon trust to lay out the same upon a purchase of lands or to put the same on good securities (*h*), or a devise of realty with a discretion to sell (*i*), will not effect conversion. The property will remain in the same state in which it is found.

But in accordance with the rule that the intention of the party if discoverable is to prevail, there are cases in which language giving an apparent option has by the context been considered sufficiently imperative to effect conversion. This has been the case where, after a direction to lay out money in the purchase of land or other securities, words of limitation have been used which are applicable only to real estate (*k*). The same was held in *Earlom v. Saunders* (*l*), where Lord Hardwicke said:—"This Court never admits trustees to have such election to change the right unless it is expressly given to them. Here the money is to be laid out in lands or securities for such uses as the land is before settled. If it is laid out in securities (which are personal) all the limitations might not take place. . . . The only way to make the clause consistent is that the money be laid out on securities till lands are purchased, and the interest and dividends in the meantime to go to such persons as would be entitled to the land." Where trustees had an express option given to them to sell real property and to reinvest on realty or personalty, the new purchase to follow the same trusts, estates, and limitations as the original estate, and they sold and invested on mortgage, it was held that there was a conversion (*m*). The distinction apparently was that in the latter case the trustees had an express power of sale in the first instance,

(*h*) *Curling v. May*, cited 3 Atk. 361.
255.

(*l*) *Amb.* 241.

(*i*) *Bourne v. B.*, 2 Ha. 35.

(*m*) *Atwell v. A.*, 13 Eq. 23.

(*k*) *Cowley v. Harstonge*, 1 Dow.

whereas in the former the money was given to them to invest on express limitations, so that their election was only as to temporary investment, not as to the general treatment of the fund.

Direction to convert on the request of third persons.

A somewhat similar distinction is taken when there is a direction to convert at the request of certain persons. If the words of request are merely inserted for the purpose of enforcing the obligation to convert, then, although conversion takes place without a request having been made, it will be considered to have been properly effected (*n*). It was there said: "Nothing is more common than to direct money to be laid out upon request. The object of that is only to ensure that the act shall be done when the request is made, not to prevent it until request" (*o*). But if the words requiring the request or consent are inserted for the purpose of giving a discretion to the persons concerned, and then a sale takes place without such request, it will be considered improper, and there will be no conversion (*p*).

Partial conversion under discretionary power.

Where, again, a mere discretionary power to convert property is given to trustees, and only a partial conversion is made before the power is extinguished by the death of the trustees, the property must be taken as it is found by those entitled, according to its character (*q*). It is otherwise in the case of an imperative power in the nature of a trust (*r*).

Express power of sale does not *ipso facto* convert.

Where from the nature of the transaction there is evidently no intention to convert, an express power of sale will not effect conversion.

E.g., mortgages.

This is the case in mortgages. The general intention of a mortgagor is to raise money, not to alter the condition or the mode of devolution of the property. On the death of a mortgagor, therefore, the equity of redemption devolves upon his heir or devisee, notwithstanding a power of sale in the mortgage, and a provision that the surplus monies

(*n*) *Thornton v. Hawley*, 10 Ves. 129.

(*o*) Per Sir W. Grant, M. R.

(*p*) *Davies v. Goodkew*, 6 Sim. 585.

(*q*) *Walter v. Maunde*, 19 Ves. 424; *Rich v. Whitfield*, 2 Eq. 583.

(*r*) *Grierson v. Kirsopp*, 2 Keen, 653.

arising from a sale shall be paid to the mortgagor, his executors, or administrators. Thus if the sale does not take place till after the death of the mortgagor, his heir or devisee will be entitled to the money; though if the sale takes place in the mortgagor's lifetime the conversion will be complete, and the money will become the personal estate of the mortgagor (s).

2. *By act of Court, or third parties.*

There are also cases in which conversion takes place apart from any intention of the owner of the property.

Conversion apart from the owner's intention. In bankruptcy.

Thus if the real estate of a bankrupt is in his lifetime contracted to be sold, it is considered to be converted; and upon his death intestate his heir-at-law will not be entitled to it, or to any part of it not required for the satisfaction of his debts (t).

In the case of a lunatic, the Court will not generally alter the state of the property so as to affect his successors, but it may do so when it is for the benefit of the lunatic himself (u), and when it does so the conversion produces all its natural consequences (x).

For benefit of lunatic

The law with regard to infants seems now to be on the same footing. Previous to the Wills' Act (y), when an infant might bequeath his personalty at an earlier age than he could devise his realty, there was great indisposition in the Court to interfere with this right by converting his property, and it was only done in cases of urgent necessity (z). But this reason now no longer exists, and there is, therefore, nothing to distinguish the case from that of a lunatic (a).

or infant.

In the absence of special clauses for that purpose, the effect of a Railway Act is not to alter the devolution of property without the consent of the owner; and, therefore,

Purchase under a Railway Act.

(s) *Wright v. Rose*, 2 S. & S. 323.

(t) *Banks v. Scott*, 5 Mad. 493.

(u) *Oxenden v. Compton*, 2 Ves. jr. 72; *Exp. Phillips*, 19 Ves. 124.

(x) *Exp. Grimstone*, Amb. 706; 4 Bro. C. C. 235; *In re Mary Smith*,

10 Ch. 79.

(y) 1 Vict. c. 26.

(z) *Exp. Grimstone*, *sup.*

(a) *Dyer v. D.*, 34 Beav. 504; and see *Exp. Bromfield*, 1 Ves. jr. 461; 3 Bro. C. C. 515.

if a company contract with an incapacitated person, as a lunatic, the purchase-money of land will not be deemed to have been converted (*b*).

Purchase
under
compul-
sory
powers;
8 & 9 Vict.
c. 18.
Lunatic.
Infant.

When land was taken by virtue of compulsory powers under the Lands Clauses Consolidation Act, 1845 (*c*), from a person of unsound mind not so found by inquisition, and the money was paid into Court, it was held that there was a conversion, and on the owner's death intestate his personal representatives were entitled (*d*). But more recently, where the land of an infant was taken by a railway company under sect. 69 of this Act, it was held that the purchase-money retained its character of real estate, and descended to the infant's heir-at-law (*e*).

Sale under
Partition
Acts.

In the case of a sale of infant's property under a decree in a partition action, it was also held that there was no conversion and the proceeds of sale retained their character of realty, by virtue of sect. 8 of the Partition Act, 1868 (*f*).

Married
woman.

A married woman may, under sect. 7 of the Lands Clauses Act (*g*), dispose of a reversionary interest in real property to a railway company so as to convert the proceeds into personalty (*h*).

II. *The effects of Conversion.*

These may be most conveniently discussed by distinguishing the case of the conversion of money into land from that of land into money.

1. *Of money into land.*

Money
converted
into land
acquires

Generally speaking, money directed to be laid out in land, whether by contract or will, acquires all the properties of land. Thus it will descend as land to the legal heir (*i*).

(*b*) *M. C. R. Co. v. Ogwin*, 1 Coll. 74, 80; *Re Sloper*, 22 Beav. 198, cited.

(*c*) 8 & 9 Vict. c. 18.

(*d*) *Exp. Flamank*, 1 Sim. N. S. 260.

(*e*) *Kelland v. Fulford*, 6 Ch. D.

491.

(*f*) 31 & 32 Vict. c. 40. *Foster v. F.*, 1 Ch. D. 588.

(*g*) 8 & 9 Vict. c. 18.

(*h*) *Cooper v. Gostling*, 4 Giff. 449.

(*i*) *Scudamore v. S.*, Prec. Ch. 543.

In what character it will be taken by an heir will be elsewhere considered (*k*). It will pass by a general devise (*l*), and not by a general bequest (*m*). It will be subject to tenancy by the curtesy (*n*); but was not subject to dower, while it did not attach on equitable estates (*o*). Now, by virtue of 3 & 4 Will. IV. c. 105, it presumably will be so.

But in some respects money directed to be laid out in land is not impressed with the quality of land. It is not deemed land for fiscal purposes, but is liable to legacy, not to succession, duty (*p*). Upon the death of a person entitled without heirs, it will not escheat to the Crown (*q*), nor was it formerly forfeited to the Crown for felony (*r*). All such forfeiture is now abolished (*s*). Properties of land.
Exceptions.

2. *Of land into money.*

Following the analogy of the converse case, land notionally converted into money will pass to the personal representatives of a deceased person (*t*), or will be included under a general residuary bequest (*u*), and will not be affected by a devise of land (*x*). An alien, even previous to 33 Vict. c. 14, was entitled to the proceeds of sale of land devised to be sold for his benefit (*y*). The proceeds of sale of a real estate directed to be sold are liable to legacy duty (*z*); but not to probate duty (*a*). Land into money.

There are exceptions also in this case: thus monies to arise from sales of land are within the provisions of the Mortmain Act (*b*). It, however, does not escheat to the Crown upon a failure of heirs, nor has the Crown any right to come into equity to ask that the land shall be converted How far retaining quality of land.

(*k*) p. 430.

(*l*) *Greenhill v. G.*, 2 Vern. 679.

(*m*) *Edwards v. C. of Warwick*, 2 P. Wms. 171.

(*n*) *Sweetapple v. Bindon*, 2 Vern. 536.

(*o*) *Cunningham v. Moody*, 1 Ves. sr. 174, 176.

(*p*) *Re De Lancy*, 6 L. R. Ex. 102.

(*q*) *Walker v. Denne*, 2 Ves. jr. 170, 185.

(*r*) *Re Harrop's Estate*, 3 Drew, 726.

(*s*) 33 & 34 Vict. c. 23, s. 1.

(*t*) *Ashby v. Palmer*, 1 Mer. 296.

(*u*) *Stead v. Newdigate*, 2 Mer. 521.

(*x*) *Elliott v. Fisher*, 12 Sim. 505.

(*y*) *Du Hourmielin v. Sheldon*, 1 Beav. 79; 4 My. & Cr. 525.

(*z*) 55 Geo. III. c. 184; *Att.-Gen. v. Holford*, 1 Pri. 426.

(*a*) *Watson v. Swift*, 8 Beav. 368.

(*b*) 9 Geo. II. c. 36; *Att.-Gen. v. Weymouth, Amb.* 20; *Brook v. Badley* 4 Eq. 106; 3 Ch. 672.

in order that it may take as *bona vacantia*. Even if it has been actually converted, but unnecessarily so, the Crown cannot make good its claim; the money will belong to the trustees (c).

3. *Character of converted property.*

Nature of
converted
property.

We have seen that money directed to be laid out in land acquires the descendible property of land, so as to pass in case of intestacy to the heir. The question then often arises as to the character in which the heir receives it—that is, whether it becomes his real or his personal property. This is evidently an all-important inquiry as between his representatives, when the heir thus receiving the converted money dies without having made any disposition thereof. The nature of the property in the hands of the heir has been held to depend upon the manner in which the conversion has taken place.

Depends
on manner
of con-
version.

First, if the converted money was bequeathed to be invested in land for the use of A. and his heirs, or on his marriage money has been paid by him, or paid or covenanted to be paid by a stranger to trustees, to be laid out in land and settled in strict settlement, with remainder to the heirs of A., then A. will hold the converted money as land, and on his decease his heir will be preferred to his personal representative (d).

Secondly, if A. has covenanted to lay out a sum of money in land to be settled on himself for life, remainder to his wife for life, remainder to the issue of the marriage, and he dies leaving his wife or any issue of the marriage surviving him, then also the conversion continues to operate; and on the death of the wife and issue, the heir of A. will be entitled to it (e).

But if, in such a case as the last, A. does not leave any wife or issue him surviving, then on his decease his personal representative will be entitled; the distinction

(c) *Taylor v. Haygarth*, 14 Sim. 8; *Cradock v. Owen*, 2 Sm. & G. 241.

543; *Disher v. D.*, 1 P. Wms. 204.

(e) *Kettleby v. Atwood*, 1 Vern. 298, 471.

(d) *Scudamore v. S.*, Prec. Ch.

being, that in this case the obligation to lay out the money and the right to call for it have become centered in the same person, so that the covenant may be considered discharged. There is then no equity left in his heir to call for the money from his personal representative (*f*).

The principle may perhaps be thus expressed: if at the death of the person first entitled to the converted fund there still exists an enforceable obligation to convert it, the effect of the conversion continues, and the heir takes; but if previous to his death this obligation ceases, the right to demand and the duty to effect the conversion centering in the same person, then the effect of the conversion ceases, and on his death his personal representative takes (*g*).

Principle
of the
distinc-
tions.

III. *Time from which Conversion takes place.*

Many important questions depend upon the question as to the precise time from which the doctrine of conversion begins to operate upon the property concerned. The general principle is that where an absolute conversion is directed to be made, it takes effect at the time at which the instrument directing it comes into operation. Thus in the case of a will the conversion takes place at the death of the testator (*h*). In the case of a deed it takes place at the date of the execution and delivery (*i*); and this notwithstanding that the actual transmutation is directed not to take place until a future time (*k*).

General
rule as to
time of
conver-
sion, when
directed.

When conversion takes place not under the intention of the owner, the time of its operation depends upon circumstances. Thus in the case of the sale of a bankrupt's real estate, if such sale takes place after the death of the

In bank-
ruptcy.

(*f*) *Chichester v. Bickerstaffe*, 2 Vern. 295; *Pulteney v. Darlington*, 1 Bro. C. C. 223.

(*g*) *Wheldale v. Partridge*, 8 Ves. 235.

(*h*) *Beauclerk v. Mead*, 2 Atk. 167.

(*i*) *Griffith v. Ricketts*, 7 Ha. 299.

(*k*) *Hewitt v. Wright*, 1 Bro. C. C. 86; *Clarke v. Franklin*, 4 K. & J. 257.

bankrupt, no actual conversion having taken place in his lifetime, whatever remains after satisfying the creditors will belong to his heir-at-law (*l*), though, as we have seen, if the sale took place in his lifetime the surplus would pass to his next of kin. Thus conversion only takes place at the time of the contract for sale.

In com-
pulsory
purchases.

A mere notice to treat by a company having compulsory powers of purchasing land will not operate as a conversion thereof into personalty (*m*). As soon, however, as the quantity and price is fixed between the landowner and the company, conversion takes place (*n*). The same is the case when the price is fixed by arbitration (*o*), by valuation (*p*), or by verdict of a jury (*q*). The actual time of conversion seems to be the completion of a binding agreement if voluntary, or the ascertaining of the definite terms of the transaction if compulsory (*r*).

Where
conversion
depends
on the
option of
a third
person.

In a case in which the conversion is not absolutely directed, but is made to depend upon the option of another person, the same general rule applies. Thus where a farm was leased to A. for seven years, and on the lease was endorsed an agreement that A. should have an option within a given time of purchasing the inheritance for £3000, it was held that the conversion took place as from the execution of the lease; and the lessor having died before the option of purchase was exercised, the money was treated as part of his personal estate (*s*). Nevertheless, until the option in such a case is exercised, the rents and profits go to the person entitled to the real estate (*t*). The result therefore is that the ultimate destination of the property depends entirely upon the choice of the person who has the option of purchase. If he elects

(*l*) *Banks v. Scott*, 3 Madd. 493.

(*m*) *Haynes v. H.*, 1 Dr. & Sm. 426; *Exp. Arnold*, 32 Beav. 591; *Richmond v. N. L. R. Co.*, 5 Eq. 352.

(*n*) *Exp. Hawkins*, 13 Sim. 569.

(*o*) *Harding v. Met. Ry. Co.*, 7 Ch. 154.

(*p*) *Watts v. W.*, 17 Eq. 217.

(*q*) *Haynes v. H.*, *sup.*

(*r*) See also *Re Dykes' Estate*, 7 Eq. 337; *Re M. & S. R. Co.*, 19 Beav. 365.

(*s*) *Laves v. Bennett*, 1 Cox, 167.

(*t*) *Townley v. Bedwell*, 14 Ves. 591; *Exp. Hardy*, 30 Beav. 206.

not to purchase, it remains real estate; if he elects to purchase, it is deemed converted into personal estate, and the conversion is deemed to relate back to the time when the option was given.

Such is the case where there is nothing to indicate a contrary intention on the part of the original owner; but like all secondary rules respecting the construction of instruments, it is subject to the primary rule that the intention of the owner, where it can be ascertained, is to prevail. If, therefore, in the instrument by which the option is given, there is an express direction that the purchase-money shall be paid to the person who is then the owner of the estate, he alone will be entitled to it (*u*). And if, *after* having given an option of purchasing certain real estate, a testator *specifically* devises the same estate, this amounts to a sufficiently clear indication of intention respecting it to entitle the devisee to the purchase-money when the option has been exercised (*x*). No such intention would be inferred from a mere *general* devise, after the agreement (*y*); nor if the agreement for the optional purchase is made *subsequently* to the will containing a specific devise of the property (*z*).

IV. *Effects of failure of the purposes for which Conversion is directed.*

1. *Where conversion is voluntary.*

The general rule is that when a conversion is directed by will, and the purpose for which the conversion was intended totally fails before the will comes into operation, that is in the testator's lifetime, no conversion will take place, and the property so directed to be converted will result to the testator in its original form

Total failure no conversion.

(*u*) *Re Graves Minor*, 15 Ir. Ch. 722.
Rep. 357.

(*y*) *Collingwood v. Row*, 5 W. R.

(*x*) *Drant v. Vause*, 1 Y. & C. Ch. 484.
580; *Emuss v. Smith*, 2 De G. & S.

(*z*) *Weeding v. W.*, 1 J. & H. 424.

unchanged (*a*). "Every conversion, however absolute in its terms, will be deemed to be a conversion for the purposes of the will only, unless the testator distinctly indicates an intention that it is, on the failure of those purposes, to prevail as between the persons on whom the law casts the real and personal property of an intestate, namely, the heir and next of kin" (*b*).

Partial failure; conversion takes place only so far as necessary.

If the failure is but partial, conversion will take place only to such extent as is necessary to effect the purpose of the will. And, in as far as it is not required for that purpose, it will result unchanged. Thus in

ACKROYD v. SMITHSON

[1 Bro. C. C. 503 ; 1 W. & T. L. C. 949]

a testator gave several legacies, and ordered his real and personal estate to be sold, and his debts and legacies to be paid out of the proceeds of the sale : he gave the residue thereof to certain legatees in the proportion of their legacies. Two of these residuary legatees died in the lifetime of the testator. It was held that these lapsed shares, so far as they were constituted of personal estate, should go to the testator's next of kin, and so far as they were constituted of real estate to his heir, notwithstanding the directed sale. Even where there was a direction that the proceeds of real estate should be deemed personalty, and it was expressly declared that it should not lapse for the benefit of the heir-at-law, the heir-at-law was held not to be excluded. It was considered that the declaration was only intended to apply as far as conversion was required for the purposes of the will, and that it did not prevent the law from dealing with a surplus in accordance with its usual rules (*c*). The heir will only be excluded by a gift over, in case of a lapse (*d*).

The same result follows where money arising from land

(*a*) *Hill v. Cock*, 1 V. & B. 175 ;
Fitch v. Weber, 6 Ha. 145.

(*b*) 1 Jarm. Wills. 530, 2nd ed.

(*c*) *Fitch v. Weber*, *sup.*; *Collins v. Wakeman*, 2 Ves. jr. 683.

(*d*) *Ibid.*

directed to be sold is given over on an event which never happens (*e*), and where the whole or a part of the purpose for which it is given fails for illegality, as, for instance, being void under the Mortmain Act (*f*), or being so limited as to transgress the rule as to perpetuities (*g*).

The rule that conversion takes place only so far as the purposes of the will require, applies equally whether it be land converted into money, or money into land (*h*). And it will have been seen from the cases of *Ackroyd v. Smithson* and *Jessop v. Watson*, above referred to, that it is immaterial that there is a blending of the proceeds of sale of realty with the personalty.

Rule applies whether land be converted into money or vice versa.

Blending of proceeds of sale and personalty immaterial.

So far we have considered only those cases in which, there being a failure of the purposes for which conversion is directed, the conflict as to who shall take the lapsed property is only between the heir and next of kin. The testator, however, may provide for a lapse by making a gift over of the property which may be thus released. If such a gift over is specific and clear, no difficulty arises; but conflict is often occasioned where the only gift over is in the form of a residuary devise or bequest; it being frequently open to question whether such residuary gift was intended to comprise the undisposed-of shares.

Effect of gift over.

Specific gift.

One class of cases is that in which the dispute is between the heir and a residuary legatee. In *Maugham v. Mason* (*i*) a testator devised freeholds to trustees and their heirs upon trust to sell and to apply the proceeds of sale towards the payment of debts and legacies, the rents until sold to be applied to the same uses, and, after giving some pecuniary and specific legacies, as to the rest residue and remainder of his personal estate after payment of his debts, legacies, and funeral expenses, he bequeathed the same to his trustees, their executors, administrators, and assigns, upon

Residuary legacy.

(*e*) *Jessop v. Watson*, 1 My. & K. 290. 665.

(*f*) *Att.-G. v. Lord Weymouth*, 482, n; *Simmons v. Pitt*, 8 Ch. 978. Amb. 20.

(*g*) *Burley v. Eccelyn*, 16 Sim.

(*h*) *Cogan v. Stephens*, 1 Beav.

(*i*) V. & B. 410.

trust, to convert all the said residue into ready money, and to lay out the same in the purchase of freehold property to be settled as therein mentioned. The executors in fact paid all the debts, legacies, and funeral expenses out of the personal estate, and did not sell the freeholds. It was held that the freeholds resulted to the heir-at-law, and were not comprised in the residuary bequest. The principle was that the conversion was only directed for a particular purpose, and as that purpose never required it, there was no conversion, and consequently none of the results of conversion followed. If, however, the testator had declared expressly that the proceeds of the real estate should be considered a part of the personalty, the case would have been otherwise; that would have shown that the conversion was not merely intended to be for a particular purpose, but to be absolute, carrying with it all its consequences; and the proceeds of sale would accordingly be included in the residuary bequest (*k*). Apart even from such an express declaration, there may be in the circumstances of the case such an indication of intention as will lead to the same result; the blending of the proceeds of sale with the personalty supplies an argument in favour of such an intention (*l*). The intention to exclude the heir must, however, be clear. The true test is, whether the conversion is directed only for particular purposes or is intended to be absolute (*m*).

Intention to exclude the heir must be clear.

Residuary devise.

The cases are now rare in which there is a conflict between the heir and the residuary devisee, since, by the Wills Act (*n*), sect. 25, it is enacted that unless a contrary intention appears in the will, such real estate or interest therein as shall be comprised, or intended to be comprised, in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime

(*k*) *Kidney v. Coussmaker*, 1 Ves. jr. 436; *Bright v. Larcher*, 3 De G. & J. 156.

(*l*) *Byam v. Muntion*, 1 R. & M. 503; *Court v. Buckland*, 1 Ch. D.

605.

(*m*) *Amphlett v. Parke*, 2 R. & M. 221.

(*n*) 1 Vict. c. 26.

of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will. As to the law in cases not within this Act, reference may be made to *Collins v. Wakeman* (o), *Jones v. Mitchell* (p).

In the case of a failure of the purposes of conversion under an instrument *inter vivos*, the property results to the settlor or grantor. In what character he takes it, as between his real and personal representatives, we shall presently inquire.

Failure of purposes of conversion in settlement *inter vivos* resulting to settlor.

2. Conversion by order of the Court.

It has been decided that the doctrine of *Ackroyd v. Smithson* does not apply to the case of a sale under an order of the Court. Where lands were sold in order to raise the costs of an infant's partition suit, it was held that the personal representative was entitled to the surplus (q). The sale being properly made there was an immediate conversion, and there was no equity to effect a reconversion. The case, therefore, rather resembles in principle an instance of conversion under a deed, than the case of a partial failure of the purposes of conversion under a will.

Sale under order of the Court.

Complete conversion notwithstanding partial failure,

This rule, however, is of course subject to any statutory provisions which apply in particular cases. Thus where real estate to which infants were entitled was sold under a decree in a partition suit, the proceeds of sale were, by section 8 of the Partition Act, 1868 (r), treated as realty (s). The same was the case in a sale under the same circumstances of the separate estate of a married woman (t). The same again was held in a sale under the Lands Clauses Act, 1845, s. 69 (u).

unless statutes direct the contrary.

Partition Act.

L. C. C. Act, 1845.

(o) 2 Ves. jr. 683.

(p) 1 S. & S. 290.

(q) *Steed v. Preere*, 18 Eq. 192.

(r) 31 & 32 Vict. c. 40.

(s) *Foster v. F.*, 1 Ch. D. 588.

(t) *Mildmay v. Quicke*, 6 Ch. D. 553.

(u) *Kelland v. Fulford*, 6 Ch. D. 491.

V. *In what Character Unconverted Property results.*

The next inquiry is, whether an heir who takes land directed to be sold, on failure of the purposes of conversion, takes it as real or as personal property; and a similar inquiry follows respecting the next of kin taking under analogous circumstances. The questions often arise between the real and personal representatives of the persons thus benefitting by the resulting trust.

1. First as to an heir taking land directed to be sold on a lapse.

Heir takes
lapsed
land where
conversion
directed
by will;
if sale is
necessary,
as person-
alty.

Where conversion is directed by will, and there is a failure of the purposes for which it is directed, the quality in which it results to the heir depends upon the question, whether an actual sale is required for the purposes of the will. If such a sale is necessary, then, whether it has actually taken place or not before the death of the heir, the property results in a converted form as personalty; and will, on the death of the heir intestate, pass to his next of kin (*x*).

If sale not
necessary,
as land.

On the contrary, if there is no necessity for any sale in order to carry out the trusts of the will—if, for instance, there is a total failure of the purposes of conversion—then the property results to the heir as realty, and will on his death intestate descend to his heir (*y*). And if a sale has unnecessarily been effected, this will not vary the rights of the parties (*z*).

Under in-
struments
inter vivos,
if purpose
fails *ab*
initio, no
conversion

In the case of a conversion arising under an instrument *inter vivos*, the question takes a somewhat different form. In this case, if there be an entire failure of the purposes of conversion *ab initio*, no conversion is deemed to have taken place at all, and the property results to the settlor

(*x*) *Smith v. Claxton*, 4 Madd. 492; *Wright v. W.*, 16 Ves. 188.

(*y*) *Chitty v. Parker*, 2 Ves. jr. 271; *Buchanan v. Harrison*, 1 J. &

H. 673.

(*z*) *Davenport v. Colman*, 12 Sim. 610.

or grantor in its original form (*a*). If there is only a partial failure, then the conversion operates, in accordance with the usual rule, from the execution and delivery of the deed, and having once taken place, whatever results, results in its converted form (*b*). It will be observed that the underlying principle is just the same as in the case of a will. In each case the quality of the resulting property depends upon the question of the necessity for actual conversion.

2. When money is directed to be laid out in land, and the purposes for which conversion was directed fail wholly or partially, the money in so far as not required results as to the personal representative (*c*). But whereas, as we have seen in the case of a resulting trust of realty, the question as to the quality in which it results depends upon whether a conversion has been necessary or not; in the case of a resulting trust of personalty there is no similar condition. In all cases, whether a partial conversion has been necessary or not, whatever results, results as personalty (*d*). The reason of the distinction is, that in the case of lapsed realty the law carries it to the heir, who is entitled to it whether it remains in its original condition or not. But in the case of lapsed personalty it comes to hand not of the next of kin, but of the executor; and whatever he gets in *qua* executor, he must hold as personalty.

RECONVERSION.

Although land directed or agreed to be converted into money, or money directed or agreed to be converted into land, are, as we have seen, at once impressed in equity with a new character, still it is open to a person receiving the converted property, if not under disability, to elect to

(*a*) *Hewitt v. Wright*, 1 Bro. C. C. 86; *Clarke v. Franklin*, 4 K. & J. 257.

(*b*) *Griffith v. Ricketts*, 7 Ha. 299; *Wheldale v. Partridge*, 8 Ves. 236.

(*c*) *Cogan v. Stevens*, 1 Beav. 482, n.

(*d*) *Reynolds v. Godlee*, 1 Johns. 536.

take it in its original state. It has been said that "equity, like nature, will do nothing in vain" (*e*); and it would evidently be vain and useless to insist that a person should take a fund in the quality of land, when he prefers it in the form of money, and can at any moment reduce it to that form by a sale. It is necessary to consider certain rules which regulate this power of electing against an instrument which directs conversion.

Presump-
tion
against
recon-
version.

The right of electing to reconvert is simple enough when the person claiming to do so has an absolute interest in the property in question. It is to be observed, however, that the presumption is against reconversion. In case of any dispute as to the fact, the *onus* of proof is on those who allege that the owner has elected to take in the original form rather than in that directed by the instrument which effected the conversion (*f*). Further:—

Person
electing
must be
sui juris.
Lunatic.

1. *The person affecting to elect must be sui juris.*

Thus a lunatic cannot elect (*g*); neither can an infant (*h*); but in some cases, where it has been manifestly for his advantage, the Court has elected for him (*i*).

Married
woman.

A married woman with respect to her separate estate is regarded as *sui juris*, and is competent to elect (*k*). With regard to property not so limited, the law depends upon the Fines and Recoveries Act (*l*). Previous thereto, she could not, where money was directed to be laid out in land, alter its nature by contract or deed (*m*). She might, however, elect to take it as money by consent after examination in Court (*n*), and the same result was sometimes reached by the device of making a sham purchase. By section 77 of the above Act, she may now by deed

(*e*) *Soley v. Jago*, 1 P. Wms. 389.

(*f*) *Sisson v. Giles*, 3 De G. J. & S. 614; 11 W. R. 971; *Benson v. B.*, 1 P. Wms. 130.

(*g*) *Ashby v. Palmer*, 1 Mer. 296.

(*h*) *Carr v. Ellison*, 2 Bro. C. C. 56.

(*i*) *Robinson v. R.*, 19 Beav. 494.

(*k*) *Sharp v. St. Saviour*, 7 Ch. 343.

(*l*) 3 & 4 Will. IV. c. 74.

(*m*) *Oldham v. Hughes*, 2 Atk. 453.

(*n*) *Ibid.*

acknowledged effectually elect to take as money (*o*). Under the same section, she may in the same manner elect to take in its original form real estate directed to be converted into money (*p*), even though it be reversionary (*q*).

2. No one can so elect as to bind any interests save his own and those of persons claiming through him. Thus a remainder-man cannot elect to take as money a fund directed to be laid out in land, against the wish of the tenant for life, who has a right to insist on having it laid out as directed (*r*). And in the same case it was laid down that even if a remainder-man purported so to elect, he could not do so, so as to affect the rights of his real and personal representatives in case of intestacy; and that, therefore, his heir would, notwithstanding his attempt, be entitled to the money. He may, of course, by deed or will dispose of his own interest in such a manner as he pleases (*s*).

Person can only bind his own interest by election.

A tenant-in-tail of money directed to be invested in land might as against his issue elect to take as money (*t*), but he could not prejudice the rights of remainder-men (*u*). Now, by the Fines and Recoveries Act (*x*), section 71, money directed to be laid out in lands to be settled in tail is for the purposes of that Act to be treated as the lands to be purchased would be treated, and to be considered subject to the same estates as the lands to be purchased would, if purchased, have been actually subject to.

Tenant-in-tail.

The same principle applies when the property in question is bestowed on a number of persons in undivided shares. If election to take it in its original form can be made without prejudice to the others it is allowable; if not, it is not so. The application of this leads to the following distinction. If money is directed to be laid out in land and devised to a number of tenants in common, then any one

Person interested in undivided shares. Election of one may not prejudice others.

(*o*) *Forbes v. Adams*, 9 Sim. 462.

(*p*) *Briggs v. Chamberlain*, 11 Ha. 69; *Franks v. Bollans*, 3 Ch. 717.

(*q*) *Tuer v. Turner*, 20 Beav. 560.

(*r*) *Sisson v. Giles*, *sup.*

(*s*) *Lingen v. Sowray*, 1 P. Wms. 172.

(*t*) *Benson v. B.*, *sup.*

(*u*) *Trafford v. Boehm*, 3 Atk. 440.

(*x*) 3 & 4 Will. IV. c. 71.

or more may elect to take his or their shares as money; since this will in no way interfere with the others having the money laid out in land if they so choose (*y*). But if land is directed to be sold and the money divided equally, then it is not open to one of the co-legatees to elect to take his share as land; for to allow this would prejudice the sale, and so interfere with the rights of the others (*z*).

Person
entitled
contin-
gently.

A person contingently entitled to the proceeds of real estate directed to be sold may, pending the contingency, elect to take the estate as realty, and such election will become operative upon the contingency happening before or upon his death (*a*).

3. *How an election to reconvert may be effected.*

Intention
expressed.

(1.) When there exists an election to reconvert, this may of course be effected by an express declaration of intention. A parol declaration has been often held sufficient (*b*), but was refused in *Bradish v. Gee* (*c*).

Intention
implied
from
language;

(2.) Election may be implied from language which does not amount to an express declaration; for instance, where a fund had been agreed to be laid out in land, a description thereof in a will as money amounted to an election to take it as personalty (*d*). Similarly a devise of land as such amounted to an election to take as land, notwithstanding that a sale had been directed (*e*).

from acts.
Illustra-
tions.

(3.) Election may be implied from the acts of the party entitled; and very slight circumstances will suffice. Thus keeping land unsold for a long time raises a presumption of an election to take as land (*f*). Two years' retention was, however, considered insufficient (*g*). The granting of a lease and reserving a rent was held sufficient evidence of an intention to reconvert (*h*); and the same was the case

(*y*) *Seely v. Jago*, 1 P. Wms. 389;

Walker v. Denne, 2 Ves. jr. 182.

(*z*) *Deeth v. Hale*, 2 Mall. 317;

Holloway v. Radcliffe, 23 Beav. 163.

(*a*) *Meek v. Devenish*, 6 Ch. D. 566.

(*b*) *Edwards v. Warwick*, 2 P.

Wms. 174; *Pulteney v. Darlington*,

1 Bro. C. C. 237; *Wheldale v. Parti-*

ridge, 8 Ves. 236.

(*c*) Amb. 229.

(*d*) *Pulteney v. Darlington*, *sup.*

(*e*) *Sharp v. St. Sauveur*, 7 Ch. 343.

(*f*) *Dixon v. Gayfere*, 17 Beav.

433; *Mutlow v. Bigg*, 1 Ch. D. 385.

(*g*) *Kirkman v. Miles*, 13 Ves.

338.

(*h*) *Crabtree v. Bramble*, 3 Atk. 680.

where the *cestui que trust* of lands settled on trust for sale obtained possession of the title deeds, and retained them together with possession of the land until his death (*i*). Acts, however, which show an intention to reconvert lands directed to be sold, in which a person has an immediate interest, were held not applicable to lands devised by the same will, the direction to convert which was only to come into operation after a life interest still in existence. The intention to reconvert those in possession did not imply a similar intention as to others in remainder (*k*).

When money directed to be laid out in land is received by the beneficiary from the trustees, it is deemed to be reconverted (*l*) ; but the receipt of the income for a long time was not considered sufficient (*m*). Where securities for monies were assigned to trustees, to be invested in land to be settled upon a man and his wife with an ultimate limitation to the man's right heirs, and the husband died after some of the money had been laid out on other personal securities in trust for him, his executors, and administrators, there was held to be an election to take the money as personalty (*n*).

The mere neglect of trustees to perform their duty of effecting a conversion which is directed, will not affect the rights of others through the medium of the principle of reconversion. It falls rather within the doctrine of primary conversion, which rests, as we have seen, on the maxim that equity regards that done which ought to have been done (*o*).

(*i*) *Davies v. Ashford*, 15 Sim. 44.

& Sm. 372 ; *Re Pedder's Settlement*,

(*k*) *Mercedith v. Vick*, 23 Beav.

5 De G. M. & G. 890.

559.

(*n*) *Lingen v. Sowray*, 1 P. Wms.

(*l*) *Pulteney v. Darlington*, *sup.*;

172 ; *Cookson v. C.*, 12 Cl. & F. 121.

Rook v. Worth, 1 Ves. sr.

(*o*) *Leckmere v. E. of Carlisle*, 3

(*m*) *Gillies v. Longlands*, 4 De G.

P. Wms. 215.

SECTION III.—SATISFACTION AND PERFORMANCE.

SATISFACTION.

Definition.

I. *Where the claim alleged to be satisfied arises from bounty.*

1. *Satisfaction of legacies by portions (Ademption).*

Exp. Pyc.

2. *Satisfaction of portions by legacies.*

Hinchcliffe v. Hinchcliffe.

Thynne v. Earl of Glengall.

3. *Repetition of legacies.*

Hooley v. Hatton.

II. *Satisfaction of Debts.*

1. *By legacies.*

Talbot v. Shrewsbury.

Chancey's Case.

2. *By portions.*

PERFORMANCE.

Contrasted with Satisfaction.

1. *By act of the party.*

Wilcocks v. Wilcocks.

Lechmere v. Earl of Carlisle.

2. *By operation of law (Intestacy).*

Blandy v. Widmore.

Definition. In the construction of instruments equity often recognises a principle known as the doctrine of satisfaction. It arises in cases where a donor, being already under some obligation to the donee, effects a donation under

circumstances which indicate an intention that this shall be taken in satisfaction of the prior obligation.

When this intention is expressed, no comment is required; for where the subsequent gift is expressly bestowed in extinguishment of the prior demand, the donee clearly cannot claim both (*p*). Intention expressed.

But in many cases this intention has to be implied from circumstances, and then considerable difficulty is often experienced. In dealing with them it will be convenient to distinguish between those cases in which the prior obligation arises from an act of bounty and those in which it is of the nature of a debt. Intention implied.
Division of subject.

In the former class fall the cases of the satisfaction of legacies by portions (commonly named ademption), and conversely the satisfaction of portions by legacies. From the similarity of the principles involved, we shall here also consider the case of the repetition of legacies in the same instrument, sometimes referred to as the satisfaction of legacies by legacies.

The latter head comprises the satisfaction of debts by legacies and by portions. After discussing this, we shall contrast it with the somewhat similar but distinctive doctrine of performance.

I. *Where the claim alleged to be satisfied arises from bounty.*

1. *The satisfaction of legacies by portions (Ademption).*

This subject was elaborately discussed and expounded in the leading case

EX PARTE PYE, EX PARTE DUBOST

[18 Ves. 140; 2 W. & T. L. C. 338],

where it was laid down as a general rule, that where a parent gives a legacy to a child, not stating the purpose

(*p*) *Hardingham v. Thomas*, 2 Drew, 353.

for which he gives it, he is understood to give a portion; and, since equity regards double portions with disfavour, if the parent afterwards advances a portion on the marriage of the child, the presumption arises that it was intended to be a satisfaction of the legacy, either wholly or in part.

Founda-
tion of the
principle.
Leaning
against
double
portions.

(1.) From this case it is seen that the principle of ademption generally rests on the leaning of equity against double portions. The rule of presumption against double portions applies only as between a child and a parent, or person who has placed himself *in loco parentis*. It has been thus commented on by a learned judge: "A parent makes a certain provision for his children by will, if they attain twenty-one or marry, or require to be settled in life; he afterwards makes an advancement to a particular child. Looking at the ordinary dealings of mankind, the Court concludes that the parent does not, when he makes that advancement, intend the will to remain in full force, and that he has satisfied in his lifetime the obligation which he would otherwise have discharged at his death; and having come to that conclusion as the result of general experience, the Court acts upon it, and gives effect to the presumption that a double provision was not intended. If, on the other hand, there is no such relation either natural or artificial, the gift proceeds from the mere bounty of the testator, and there is no reason within the knowledge of the Court for cutting off anything which has in terms been given. The testator may give a certain sum by one instrument, and precisely the same sum by another; there is no reason why the Court should assign any limit to that bounty which is wholly arbitrary. The Court, as between strangers, treats several gifts as *prima facie* cumulative" (q).

Relation-
ship;
parent and

With the exception hereafter to be noticed, then, a legacy is deemed to be satisfied by a portion only when

(q) *Suisse v. Lowther*, 2 Ha. 424, 435.

they are bestowed on a child by a parent or a person *in loco parentis* (r). The cases show that in this instance a mere natural relationship is not regarded, an illegitimate child being deemed at law a stranger to its father (s). The consequence is that an illegitimate child may happen to find itself better provided for than it would have been if legitimate.

(2.) It is often a matter of some difficulty to decide whether a person has placed himself *in loco parentis* to another or not. This depends on the intention of the person. The question is whether he meant to put himself in the situation of the lawful father of the child, as regards his office and duty to make provision for the child (t); and this question is of course one which must be decided according to the facts of each particular case. It is not possible to frame any precise formula by which to test the intention of the donor. It is at any rate not necessary that the person should in all respects adopt the child as his own, or that there should be any actual relationship between him and the child (u); and it is immaterial that the father of the child is living, if he does not maintain it (x).

(3.) It appears that the only case in which a legacy not given by a parent or person *in loco parentis* will be adeemed by a subsequent portion, is where the legacy is expressed to be given for a particular purpose, and money is subsequently advanced for the same purpose (y). Where a person left a legacy of £200 to his wife to be paid within ten days after his decease, and afterwards at the request of his wife, within a few days of his death, gave her a cheque for £200, in order that she might have a sum at her immediate disposal on his death, there was held to

child
generally
essential.

*Locus
parentis,*
how de-
termined.

Exception;
legacy for
express
purpose.

Implied
purpose
not suffi-
cient.

(r) *Booker v. Allen*, 2 R. & M. 270.

(s) *Exp. Pye*, 18 Ves. 152.

(t) *Exp. Pye*, *sup.*; *Powys v. Mansfield*, 6 Sm. 528; 3 My. & Cr. 359.

(u) *Roger v. South*, 2 Kee. 598.

(x) *Pym v. Lockyer*, 5 My. & Cr. 29; *Fowkes v. Pascoe*, 10 Ch. 350.

(y) *Debeze v. Mann*, 2 Bro. C. C. 165, 519; *Monck v. M.*, 1 Ball & B. 298, 303.

be no ademption, there being no expression in the will as to the purpose of the legacy (z). *A fortiori* there will be no ademption where the purpose of the legacy does not correspond with that of the advancement (u), or the legacy and advancement are given upon different contingencies (b).

(4.) Dismissing, then, this exceptional case, and remembering that for our present purpose a person *in loco parentis* is to be regarded as equivalent to a parent, we have now only to consider the operation of the principle of ademption as applying to gifts between a parent and child.

Portion
need not
be given
on mar-
riage.

Advancements are naturally made and portions given most frequently in connexion with the marriages of children: but this is by no means necessary to bring into operation the leaning against double portions and the rule of ademption (c).

Presump-
tion not
repelled
by slight
differ-
ences,

The presumption in favour of ademption is so strong that it will not be repelled by the fact that there are slight differences of circumstance between the legacy and the portion. Differences between them as to the times of payment will not suffice; thus where neither the legacy nor the portion was payable till after the testator's death, but the legacy was to vest in possession at the age of twenty-one years or marriage, while the provision by the settlement was payable within six months after the death, there was an ademption (d).

or even
consider-
able dif-
ferences.

Nor will a material difference between the limitations of the will and those of the settlement suffice (e). The case of *Durham v. Wharton* (f) shows that ademption may take place in the face of very considerable differences between the gifts. There a life interest in £10,000 was given to a daughter by will, and after her decease to all her children as she should appoint. On her subsequent marriage, £15,000 was paid by the testator to

(z) *Pankhurst v. Howell*, 6 Ch. 136.

(a) *Debeze v. Mann*, 2 Bro. C. C. 165, 519.

(b) *Spinks v. Robins*, 2 Atk. 491.

(c) *Leighton v. L.*, 18 Eq. 458; *Nevin v. Drysdale*, 4 Eq. 517.

(d) *Hartopp v. H.*, 17 Ves. 184.

(e) *Trimmer v. Bayne*, 7 Ves. 508.

(f) 3 Cl. & F. 146.

her husband, he securing by settlement pin money and a jointure for his wife and portions for the younger children of the marriage. Still the legacy was held to have been adeemed (*g*). A legacy to a daughter would not, however, be adeemed by a simple gift made to her husband after marriage not in pursuance of a contract made before the marriage (*h*).

Where after a legacy of a larger amount, a smaller sum is given by way of advancement or portion, it does not totally, but only *pro tanto*, adeem the legacy (*i*). It will presently be observed that this strongly distinguishes the principle of ademption from that of the satisfaction of a debt by a legacy.

It was formerly considered that a residuary bequest, being of an uncertain amount, was not susceptible of ademption (*k*); but it has now long been established that such a bequest may be adeemed either totally or *pro tanto*, as the case may be (*l*).

It seems that the doctrine of ademption does not rest solely on the ground that equity desires to secure equality between children, and for this reason discountenances double portions, as unduly favouring one; inasmuch as it is applicable even in cases where the testator leaves only one child (*m*). Where part of a *residuary* bequest to children and a stranger is adeemed by an advance to one of the children, the stranger will not be suffered to gain by the ademption, the adeemed part being divisible amongst the children only (*n*). *Secus*, however, where a pecuniary legacy is adeemed (*o*).

(5.) The following cases will indicate the limits of the application of the principle of ademption; and they serve

(*g*) See also *Montefiore v. Guedalla*, 1 De G. F. & J. 93; *Chichester v. Coventry*, 2 L. R. H. L. 71, 92.

(*h*) *Ravenscroft v. Jones*, 32 Beav. 669; 4 De G. J. & S. 224.

(*i*) *Pym v. Lockyer*, 5 My. & Cr. 29; *Kirk v. Eddowes*, 3 Ha. 509.

(*k*) *Freemantle v. Bankes*, 5 Ves.

85.

(*l*) *Scholesfield v. Hoap*, 27 Beav. 93; *Montefiore v. Guedalla*, *sup.*

(*m*) *Twining v. Powell*, 2 Coll. 262; and see 1 De G. F. & J. 103.

(*n*) *Meinertzhagen v. Walters*, 7 Ch. 670.

(*o*) *Kirk v. Eddowes*, *sup.*

well to show that ademption depends upon the presumed intention of the testator.

No ademption by occasional gifts,

A legacy by a parent is not adeemed even *pro tanto* by occasional gifts made subsequently in the testator's lifetime; nor will the Court take an account of small sums so given, to show that they were intended as a portion (*p*).

nor by a payment made before the will,

There is no presumption of law that the payment of a sum of money to a child previous to the making of the will shall operate as an ademption of a legacy therein contained (*q*). But if a legacy has been once adeemed by a subsequent advance, it will not be re-established by a codicil made after it which purports to confirm the will and all the bequests therein (*r*).

nor where the gifts differ in character or purpose.

There will be no ademption where the gifts in question are of different characters, or are expressed to be given for different purposes. Thus a legacy of £500 was not adeemed by a subsequent gift of a part of the testator's stock in trade (*s*); a legacy was held to be not adeemed by the grant of an annuity (*t*), or by an advancement which depended upon a contingency (*u*).

2. *The satisfaction of portions by legacies.*

In the above cases, the question was whether a gift having been made by will was satisfied by a subsequent advancement made or portion given *inter vivos*. We now come to the converse question, whether a portion having been contracted to be given is satisfied by a subsequent legacy.

One of the leading authorities on this branch of the subject is

HINCHCLIFFE v. HINCHCLIFFE

[3 Ves. 516],

from which we learn that most of the rules which we have

(*p*) *Watson v. W.*, 33 Beav. 574; *Re Peacock*, 14 Eq. 236; *Ravenscroft v. Jones*, 32 Beav. 669; 4 De G. J. & S. 224.

(*q*) *Taylor v. Cartwright*, 14 Eq. 167, 176.

(*r*) *Powys v. Mansfield*, 3 My. & Cr. 359, 376.

(*s*) *Holmes v. H.*, 1 Bro. C. C. 555.

(*t*) *Watson v. W.*, *sup.*

(*u*) *Spinks v. Robins*, 2 Atk. 493,

seen to be applicable in cases of ademption are of equal authority here. Thus here also the foundation of the doctrine is the distaste with which equity regards double portions; and consequently this species of satisfaction, as well as ademption, is, *primâ facie* applicable only as between children and a parent or person *in loco parentis*. From the same case, also, we observe that slight circumstances of difference will not suffice to prevent the operation of the usual presumption.

The similarity between the two classes of cases is further seen from the important case of

THYNNE v. EARL OF GLENGALL

[2 H. L. 131],

in which a residuary bequest was held to be a satisfaction of a covenant to bestow a certain portion on a daughter, notwithstanding some important differences in the limitations.

It does, however, seem that in these cases, where the settlement precedes the will, the presumption against double portions will be more easily rebutted than where the will precedes the settlement. Thus in a well-known case it has been said:—"The rule against double portions is but a rule of presumption, and there is much less difficulty in supposing that it was not intended to prevail where the person to whose dispositions it is to be applied had not the power to enforce it without the consent of others, than in a case where the whole was under his absolute control. When the will precedes the settlement, it is only necessary to read the settlement as if the person making the provision had said, 'I mean this to be in lieu of what I have given by my will.' But if the settlement precedes the will, the testator must be understood as saying, 'I give this in lieu of what I am already bound to give, if those to whom I am so bound will accept it.' It requires much less to rebut the latter presumption than the former" (x).

Presumption more easily rebutted than in ademption.

(x) *Per* Lord Cranworth, in *Chichester v. Coventry*, 2 L. R. H. L. 71.

Principle
resembles
ademp-
tion,

These expressions indicate the principal difference between these cases of the satisfaction of a portion by a legacy, and the ademption of a legacy by a portion. Where the settlement comes first, the persons entitled under it are purchasers, and no presumed intention of the testator can deprive them of their rights thus acquired. At least they have a right to elect between the benefit which by the settlement is already theirs, and that conferred by the will. If the beneficiary elects to take under the will, then, unless something rebuts the presumption against double portions, the settlement is superseded, and is not to be performed at all. If he elects to claim his rights under the settlement, then, in the same circumstances, he must to that extent give up his rights under the will to compensate those whom his election disappoints (*y*).

rather
than satis-
faction of
debts.

It might, perhaps, be supposed that the recipient of a portion under a settlement being a purchaser, this species of satisfaction would be more analogous to the satisfaction of a debt by a legacy than to the ademption of a legacy by a portion. This, however, is not the case. For though a portion is in its legal aspect a debt, equity still regards it as a benefit conferred; and thus it falls within the presumption against double portions, which has of course no application in the case of an ordinary debt. The consequence is that the leaning of equity is strongly in favour of the satisfaction of a portion by a legacy; while, as we shall presently observe, it is equally decided against the satisfaction of a debt by a legacy. This distinction is in itself abundantly sufficient to bring the cases we are now considering nearer to the doctrine of ademption than to that of satisfaction, as applied to ordinary debts.

Partial
satisfac-
tion.

A provision made by a will may satisfy one part of a covenant without satisfying the whole. Thus if the covenant gives a life interest to a daughter, with remainder to children, a legacy to the daughter may satisfy her life

(*y*) *Chichester v. Coventry*, 2 L. R. 3 Eq. 236.
H. L. 71; *McCarougher v. Whieldon*,

interest, but cannot satisfy the claim of the children (2). And similarly, there may be a satisfaction of the children's portion, not touching that of the parent (a).

Where a settlement contained a declaration that an advancement by the parent in his lifetime should be considered as satisfaction of a portion covenanted to be bestowed, a legacy given by will was considered not to be equivalent to an advancement in the lifetime so as to come within the declaration; and there was held to be no satisfaction (b).

Save as here excepted, it may be generally understood that the limitations and conditions of the principle above stated as applicable to ademption, are applicable also in the case of satisfaction of a portion by a legacy (c).

There has been a great deal of learned argument touching the admissibility of extrinsic evidence (that is, evidence of facts not contained in the instruments themselves) in order to decide for or against the application of the doctrine of satisfaction; but the results of the cases are reducible to a few simple principles.

(1.) Parol evidence of extrinsic circumstances is not admitted to alter, add to, or vary a written instrument, or to prove with what intention it was executed. In *Hall v. Hill* (d) the question was whether a portion had been satisfied by a legacy. It was clear that in the absence of extrinsic evidence of the testator's intention when he made his will there would be no satisfaction. Evidence was tendered which clearly showed that the testator in fact intended the legacy to satisfy the portion. The evidence was rejected on the ground that it had nothing to do with the debt, but applied to the will only, and, in fact, amounted to the insertion in the will of a declaration which was not there.

(2) *Bethell v. Abraham*, 3 Ch. D. 590.

(a) *Chichester v. Coventry*, 2 L. R. H. L. 71, 92; *Mayd v. Field*, 3 Ch. D. 587.

(b) *Cooper v. C.*, 8 Ch. 813.

(c) *Bellasis v. Uthwatt*, 1 Atk. 427; *Lethbridge v. Thurlow*, 15 Beav. 334; *Sparkes v. Cator*, 3 Ves. 530.

(d) 1 D. & War. 94.

Gift by will not equivalent to advancement in lifetime.

Rules as to extrinsic evidence.

1. Not admitted to vary written instruments.

2. Admitted to rebut presumption of law.

(2.) But where the law presumes a certain intention from collateral circumstances, such as a certain relationship between the parties, then extrinsic evidence is admissible to rebut this presumption. It was said in *Kirk v. Eddowes* (e), that where "the law raises a presumption that the second instrument was an ademption of the gift by the instrument of earlier date, evidence may be gone into to show that such presumption is not in accordance with the intention of the author of the gift" (f).

3. When so admitted, counter-evidence admissible.

(3.) Where evidence is admissible to rebut such presumption, counter-evidence is admissible (g).

In *Kirk v. Eddowes* (h) the question was whether a legacy was *pro tanto* adeemed by a subsequent gift of a promissory note made without any writing. Evidence was tendered which related to this gift, not to the written instrument; and it was held that evidence of such a nature being admissible to rebut the presumption of law, counter-evidence was admissible in support of the presumption (i).

3. Repetition of legacies.

Repetition of legacies.

In many respects similar to the ademption of legacies by portions, and the satisfaction of portions by legacies, are the cases which arise when two legacies are given by the same will, or by a will and codicil, and it is doubtful whether the second legacy is intended to be additional to the first, or to be merely a repetition.

The case most usually referred to on this subject is

HOOLEY v. HATTON

[1 Bro. C. C. 390, n.; 2 W. & T. L. C. 321].

In this case Lady Finch gave to Lydia Hooley, the plaintiff, £500 by her will. She made a codicil in these words: "I add this codicil to my will: I give Lydia Hooley £1000." The plaintiff filed a bill claiming these legacies,

(e) 3 Ha. 509.

(f) See, also, *Debt v. Mann*,
2 Bro. C. C. 165, 519.

(g) *Ibid.*

(h) *Supra.*

(i) See *Palmer v. Newell*, 20 Beav.
32, 39.

and the question was whether she was entitled to them both, or only to the £1000. There being no internal evidence touching the question, it was decided on the general rule of law that the legacies were cumulative, and the plaintiff was declared entitled to them both.

The judgment of Aston, J., in this case classified double legacies under four heads: (1) where the same specific thing is given twice; (2) where the like quantity is given twice; (3) where a greater sum is given first, and a less sum afterwards; (4) where a smaller sum is given first, and a greater sum afterwards.

The first case presents no difficulty, since where the same specific thing or *corpus* is twice expressed to be given, whether in the same or in different instruments, it must clearly be regarded as a repetition (*k*).

The remaining three classes may be most conveniently considered together, distinguishing, however, those cases in which the two gifts are contained in the same instrument from those in which they are given by two instruments.

(1.) Where two pecuniary legacies are given by the same instrument.

The general rule is that when two legacies of the same amount are given by the same instrument there will be considered to be a repetition, and one only will be good (*l*). And the same rule applies to annuities (*m*).

But where the two legacies are of unequal amount, whether the greater precedes the less, or the less the greater, they are *primâ facie* cumulative (*n*).

(2.) Where two pecuniary legacies are given by different instruments.

The rules regulating these cases cannot be so simply stated.

Primâ facie, if the legacies are given *simpliciter*, no

(*k*) *D. of St. Albans v. Beauclerk*, 2 Atk. 636; *Suisse v. Lowther*, 2 Ha. 432.

(*l*) *Garth v. Meyrick*, 1 Bro. C. C. 30.

(*m*) *Holford v. Wood*, 4 Ves. 76.

(*n*) *Windham v. W.*, Rep. t. Finch, 267; *Hartley v. Ostler*, 22 Beav. 449.

Classifica-
tion in
Hooley v.
Hatton.

Specific
legacy.

Legacies
of
quantity.

1. In same
instru-
ment.

If equal,
repetition.

If unequal,
not so.

In differ-
ent instru-
ments.

Primâ

facie cumu- motive for the gift being expressed, they are regarded as
lative. cumulative; and it is immaterial whether they are of equal or unequal amount (*o*). *A fortiori* they will be cumulative when there is any difference in their nature or time of payment (*p*), or they are given upon or for different trusts or purposes (*q*).

If equal and on same motive, repetition. If, however, the same motive is expressed for both gifts, and the same sum is given, then, though the gifts are contained in two instruments, there will be deemed to be a repetition, and only one will be payable (*r*).

Not other- wise. But if the same sums are given and different motives are expressed (*s*), or if the same motive is expressed and different sums are given (*t*), then the two gifts will be considered cumulative.

(3.) Such are the general rules, but they are subject to modification according to the evidence which may be forthcoming as to the testator's intention.

Intrinsic evidence. As to intrinsic evidence there is no difficulty; it is always available to explain the intention. Thus the fact that the second instrument expressly refers to the first, or seems to be merely a copy of it, may, even where the sums given are unequal, lead to the conclusion that the second was intended to substitute, and not to be added to, the first (*u*). And similarly, where two precisely similar codicils were executed at the same time, it was considered that the intention was to execute them in duplicate, and not to give double legacies (*x*). And the same conclusion was reached where two precisely similar instruments were executed, though at different times (*y*).

(*o*) *Roch v. Callen*, 6 Ha. 531; *Russell v. Dickson*, 4 H. L. 293; *Wilson v. O'Leary*, 12 Eq. 525; 7 Ch. 448.

(*p*) *Hodges v. Peacock*, 3 Ves. 735; *Masters v. M.*, 1 P. Wms. 421.

(*q*) *Saurey v. Rumney*, 5 De G. & S. 698; *Spire v. Smith*, 1 Beav. 419.

(*r*) *Hurst v. Beach*, 5 Madd. 351,

358; *Roch v. Callen*, *sup.*

(*s*) *Ridges v. Morrison*, 1 Bro. C. C. 388.

(*t*) *Hurst v. Beach*, *sup.*

(*u*) *Martin v. Drinkwater*, 2 Beav. 215; *Coote v. Boyd*, 2 Bro. C. C. 521.

(*x*) *Whyte v. W.*, 17 Eq. 50.

(*y*) *Hubbard v. Alexander*, 3 Ch. D. 738.

The rules as to extrinsic evidence are similar to those above stated as ordinarily applicable in a case of satisfaction or ademption. Where the Court raises the presumption against double legacies (*e.g.*, where two equal legacies are given by one instrument, or in different instruments with the same motive expressed), then such evidence is admissible to show that the testator intended both to be paid. Extrinsic evidence.

But where the Court does not raise this presumption (*e.g.*, where legacies of different amounts are given by the same will, or legacies of the same amount *simpliciter* by different instruments), then extrinsic evidence is not admissible to show that the testator intended only the latter to be paid (*z*).

In short, extrinsic evidence is admissible in favour of, but not against, a legatee claiming the legacies as cumulative.

As a general rule, where one legacy is given merely in substitution for another, it will, in the absence of any expression of a contrary intention on the part of the testator, be liable to the same incidents as the legacy for which it is substituted (*a*) ; but this is, of course, not so where the second legacy is a distinct and substantive bequest (*b*). An additional legacy, though not so expressed, will in general be held subject to the same incidents and conditions as the first legacy. Thus if a legacy be given by will to a married woman to her separate use, an additional legacy given by the codicil will also be held for her separate use (*c*). In no case, however, has it been held that the latter gift is to go to the parties entitled under the subsequent limitations of the former gift (*d*). Substituted legacy subject to condition of first.

(*z*) *Hurst v. Beach*, *sup.*; *Guy v. Sharp*, 1 My. & K. 589. 183.

(*c*) *Day v. Croft*, 4 Beav. 561.

(*a*) *Cooper v. Day*, 3 Mer. 154.

(*d*) *Mann v. Fuller*, Kay, 624.

(*b*) *Chatteris v. Young*, 2 Russ.

II. *Where the Claim alleged to be satisfied is of a Legal Nature.*

1. *Satisfaction of debts by legacies.*

The leading authority on this branch of the subject is

TALBOT v. THE DUKE OF SHREWSBURY

[Prec. Ch. 394; 2 W. & T. L. C. 352],

where the principle is laid down that if a debtor, without taking notice of the debt, bequeaths a sum as great as, or greater than the debt, to his creditor, this is to be deemed a satisfaction of the debt; but that a legacy of less amount than the debt is not regarded as a satisfaction *pro tanto*, nor will a contingent legacy ever operate as a satisfaction.

Satisfaction depends on presumed intention.

These cases rest, as do all cases of satisfaction, on the presumed intention of the donor, and they illustrate the maxim, *Debitor non presumitur donare*. But the reasoning upon which the principle here rests has been often pronounced to be artificial and unsatisfactory, and the inclination of the Court is decidedly against its application, so that slight circumstances will be laid hold of to rebut the presumption.

Slight circumstances rebut the presumption.

That this is so is well shown by

CHANCEY'S CASE

[1 P. Wms. 408; 2 W. & T. L. C. 353],

in which a testator being indebted to his servant for wages, had given her a bond for £100 as due on that account, and afterwards by his will gave her £500 for her long and faithful services, and directed that all his debts and legacies should be paid. This last direction was considered sufficient to rebut the presumption of satisfaction, and the servant was held entitled to be paid both the bond and the legacy in full.

(1.) An examination of the cases will show that the principle of satisfaction as applied to debts is subject to many limitations. In the following cases the presumption of

satisfaction has been held to be rebutted by the nature of the legacy:—

(i.) Where the legacy is of less amount than the debt. In such cases there is no satisfaction, even *pro tanto* (e). Presumption re-
butted by
the nature
of the
legacy.

(ii.) Where the legacy is given upon a contingency (f). Where
legacy is
less than
debt,

(iii.) Where the legacy is of an uncertain or fluctuating amount; such as a gift of the whole or part of the testator's residue. Such a legacy will not operate as satisfaction, even though in the event it may happen to equal or exceed the amount of the debt (g). or legacy is
contingent
or un-
certain,
such as
residue.

(iv.) Where the time fixed for payment of the legacy is different from that at which the debt is due, so as to be not equally advantageous to the debtor, there will be no satisfaction (h): in this case the debt being due at the death, the legacy was directed to be paid one month after the death. Where the legacy has been payable before the debt has become due, it has been held to operate as satisfaction (i). Where the
time of
payment
differs,

(v.) There will be no satisfaction where the testamentary gift differs from the debt in character. Thus a gift of land will not satisfy a pecuniary debt (k); a legacy will not satisfy an annuity (l); nor will an absolute gift satisfy a debt held on trust for the donee for life with remainder to his children (m). or the
character
of the
gift differs.

(2.) Sometimes the presumption of satisfaction is rebutted by the nature of the debt: Thus:—

(i.) A contingent or uncertain debt, such as a debt upon an open account, cannot be satisfied by a legacy (n). But the mere fact that a debt is under certain circumstances liable to be varied in amount will not always prevent the presumption of satisfaction. Thus there was held to be satisfaction where a sum of money had been Presump-
tion re-
butted by
the nature
of the
debt.
Where
debt is
contingent
or un-
certain,

(e) *Talbot v. Shrewsbury*, *sup.*

(f) *Ibid.*; *Crompton v. Sale*, 2 P. Wms. 553.

(g) *Devese v. Pontet*, 1 Cox, 188; *Thynne v. E. of Glengall*, 2 H. L. 154.

(h) *Clark v. Sewell*, 3 Atk. 96.

(i) *Wathen v. Smith*, 4 Mad. 325.

(k) *Eastwood v. Vinke*, 2 P. Wms. 614.

(l) *Cole v. Willard*, 25 Beav. 568.

(m) *Fairer v. Park*, 3 Ch. D. 309.

(n) *Rawlins v. Powell*, 1 P. Wms. 297.

deposited with the testator, against which the creditor had drawn on him from time to time (o).

or is
contracted
sub-
sequently
to the will.

(ii.) A debt contracted subsequently to the making of the will cannot be satisfied by a legacy conferred by the will, since in such a case no intention to satisfy the debt can be reasonably presumed (p).

Presump-
tion re-
butted by
expressions
in the will.
Where a
particular
motive is
expressed,
or there is
a direction
for pay-
ment of
debts and
legacies.

(3.) In other cases it is gathered from expressions in the will that satisfaction was not intended. Thus:—

(i.) The fact that the testator has assigned a particular motive for the gift has been considered to rebut the presumption (q).

(ii.) In *Chancey's Case* (r) an express direction for the payment of debts and legacies was taken as an indication that the testator intended both the debt and legacy to be paid (s). A direction to pay debts alone has been considered not to have the same effect (t); though it is undoubtedly of great weight in that direction when taken in connexion with other circumstances tending to rebut the presumption (u).

Relation-
ship of
parent and
child im-
material.

The relationship of parent and child or husband and wife does not, it seems, affect the principle regulating these cases of satisfaction. Where there is an actual debt due to the child, as distinguished from a portion, it will only be satisfied by a legacy of equal or greater amount, and, as in other cases, the presumption will be easily rebutted (v).

Satisfac-
tion of
debt by
portion.

2. Analogous to the above instances of satisfaction, and subject to similar rules, is the case in which a father, being indebted to a child, makes an advance to him in his lifetime. The portion so advanced will *primâ jacie* effect a satisfaction if it equals or exceeds the amount of the debt (y).

(o) *Edmunds v. Low*, 3 K. & J. 318.

(p) *Crummer's Case*, 2 Salk. 508.

(q) *Mathews v. M.*, 2 Ves. sr. 635; *Charlton v. West*, 30 Beav. 124.

(r) *Sup.*, p. 458.

(s) *Richardson v. Greese*, 3 Atk. 65.

(t) *Edmunds v. Low*, *sup.*

(u) *Rowe v. R.*, 2 De G. & S. 297; *Pinchin v. Simms*, 30 Beav. 119.

(x) *Tolson v. Collins*, 4 Ves. 483; *Fowler v. F.*, 3 P. Wms. 353; *Atkinson v. Littlewood*, 18 Eq. 595.

(y) *Wood v. Briant*, 2 Atk. 521; *Plunkett v. Lewis*, 3 Ha. 316.

It is a common and well-known principle that extrinsic evidence is admissible to rebut a presumption of law (z), and on this principle extrinsic evidence should be admissible when the presumption arises that a debt is satisfied by a legacy to rebut this presumption (a). But such evidence has nevertheless been sometimes refused (b).

Quære whether extrinsic evidence is admissible.

PERFORMANCE.

The equitable doctrine of *Performance* is similar to, and yet to be carefully distinguished from, that of satisfaction, as applied to the cases we have been considering.

Satisfaction, as we have seen, wholly rests upon an implied intention of the testator; and several rules of presumption have been adopted which do not apply to cases of performance. The presumption will not hold if the gift is less beneficial in any way than the debt. There is no such thing as satisfaction *pro tanto*.

Distinction between satisfaction and performance.

The doctrine of performance rather arises from a construction which equity, in its regard for natural justice, puts upon certain circumstances, than from the implied intention of the party. It is not therefore subject to any of those rules which originate in the design of correctly ascertaining a testator's intention. And it conspicuously differs from satisfaction as applied to debts, in that performance is commonly deemed to have been effected *pro tanto*.

Performance rests on the ground of natural justice.

1. The typical case of performance is where a person covenants to do a certain act, and this covenant is considered as performed by some subsequent act which wholly or approximately effects the same purpose, though it does not expressly refer or precisely conform to the covenant.

Performance may be imputed from the acts of the covenantor.

(z) *Kirk v. Eddowes*, 3 Ha. 509; *lace v. Pomfret*, 11 Ves. 542.

Hall v. Hill, 1 D. & W. 94.

(b) *Fowler v. F.*, *sup.*; *Hall v. Hill*

(a) *Plunkett v. Lewis*, *sup.*; *Wal.* (*sup.*)

One of the most familiar cases on this point is

WILCOCKS v. WILCOCKS

[2 Vern. 558 ; 2 W. & T. L. C. 389].

There a person covenanted on his marriage to purchase lands of the value of £200 a year, and to settle them for the jointure of his wife and to the first and other sons of the marriage in tail. He purchased lands of that value, but made no settlement, so that on his death the lands descended to his eldest son. The eldest son nevertheless filed a bill for a specific performance of the covenant ; but it was held that the lands descended should be deemed a performance of the covenant.

Another similar case which further illustrates the doctrine is

LECHMERE v. EARL OF CARLISLE

[3 P. Wms. 227 ; Ca. t. Talb. 88].

Here Lord Lechmere on his marriage covenanted to lay out within one year of the marriage £6000 (his wife's portion) and £24,000, amounting in all to £30,000, in the purchase of freehold lands in possession in the south part of Great Britain, with the consent of the Earl of Carlisle and Lord Morpeth, to be settled on Lord Lechmere for life, remainder for so much as would amount to £800 a year to Lady Lechmere for her jointure, remainder to first and other sons in tail male, remainder to Lord Lechmere his heirs and assigns for ever. Lord Lechmere was seised of some lands in fee at the time of his marriage, and after his marriage purchased some estates in fee of about £500 a year, some estates for lives, and some reversionary estates in fee expectant on lives ; and he contracted for the purchase of some estates in fee in possession. These purchases were not effected with the consent of the trustees, there was no settlement made of any of the lands, and shortly afterwards Lord Lechmere died intestate. Thereupon a bill was filed by his heir for a specific performance of the covenant, and

to have the £30,000 laid out in accordance therewith out of the personal estate. It was held by Lord Talbot, on appeal, reversing the decision of Sir J. Jekyll, M. R., that the freehold lands purchased in fee simple in possession after the covenant ought to be considered as purchased in part performance of the covenant. The heir was therefore only entitled to a decree for the laying out of so much money as together with the sum already so laid out would amount to £30,000.

It will be observed that the lands possessed by the covenantor before the covenant, and lands purchased afterwards but of a different nature from what was covenanted to be purchased, were not included in the performance; and further, that the consent of the trustees was deemed not to be an essential.

The doctrine has also been applied to a case in which the covenant was to pay money to trustees to be laid out by them in a purchase of land, and the covenantor himself purchased the land, and died intestate without having effected a settlement (*c*).

The same principle is applicable where the obligation arises from an Act of Parliament instead of from a covenant (*d*).

It must be observed that a covenant to purchase lands amounts to no more than a specialty debt—it does not create a specific lien upon lands purchased; and consequently notice of such a covenant will not affect a purchaser or mortgagee of the lands (*e*). The equity of redemption was, however, held liable to the covenant in a case in which the mortgagee had no notice (*f*).

Where trustees having trust money in their hands are under an obligation to lay it out in lands, any purchase by them will more readily than in other cases be deemed a

Conclusions from the cases.

Covenant to purchase does not create a lien.

Purchase by trustees stands on higher ground.

(*c*) *Sowden v. S.*, 1 Bro. C. C. 582.

(*d*) *Tubbs v. Broadwood*, 2 R. & M. 487.

(*e*) *Deacon v. Smith*, 3 Atk. 323;

Mornington v. Keene, 2 De G. & J. 292.

(*f*) *Exp. Poole*, 11 Jur. 1005; 1 De G. 581.

performance of their obligation (*g*); though such cases usually fall under the still stronger rule that a *cestui que trust* is entitled to follow trust money, however it may have been converted (*h*).

Performance may result from the operation of law.

2. Another illustration of the doctrine of performance is where a person covenants to do an act and the covenant is in effect wholly or partially performed by the operation of law.

On this the leading authority is

BLANDY v. WIDMORE

[1 P. Wms. 323; 2 W. & T. L. C. 39].

There a man covenanted, previous to his marriage, to leave to his wife £620. He married, and died intestate, his wife's share under the intestacy being more than £620. The covenant was hereby deemed to be performed, so that the widow could not claim her share under the intestacy and £620 over and above as a debt under the covenant.

In this case the covenant was wholly satisfied, but it is equally clear that if the distributive share had been less than the sum covenanted to be paid it would be considered a performance *pro tanto* (*i*). The same principle has, moreover, been applied where the covenant has been that the executors should pay a sum of money, or that the money should be paid to trustees for the wife (*k*).

There are, however, three classes of cases which must be carefully distinguished from those which fall under this principle.

A general legacy or gift of residue is not generally performance. Share in

(1.) Where the covenantor has made a will, and thereby conferred a gift either by way of general legacy or as a residue, such a gift will not generally be deemed a performance of a covenant to leave a certain sum (*l*).

(2.) Where the covenant is not to pay a gross sum, but to give a life annuity, or the interest of a sum of money for

(*g*) *Mathias v. M.*, 3 Sm. & G. 552.

14, 16.

(*h*) *Taylor v. Plumer*, 3 M. & S. 562; *Lench v. L.*, 10 Ves. 511.

(*k*) *Lee v. D'Aranda*, 3 Atk. 419.

(*i*) *Garthshore v. Chalie*, 10 Ves.

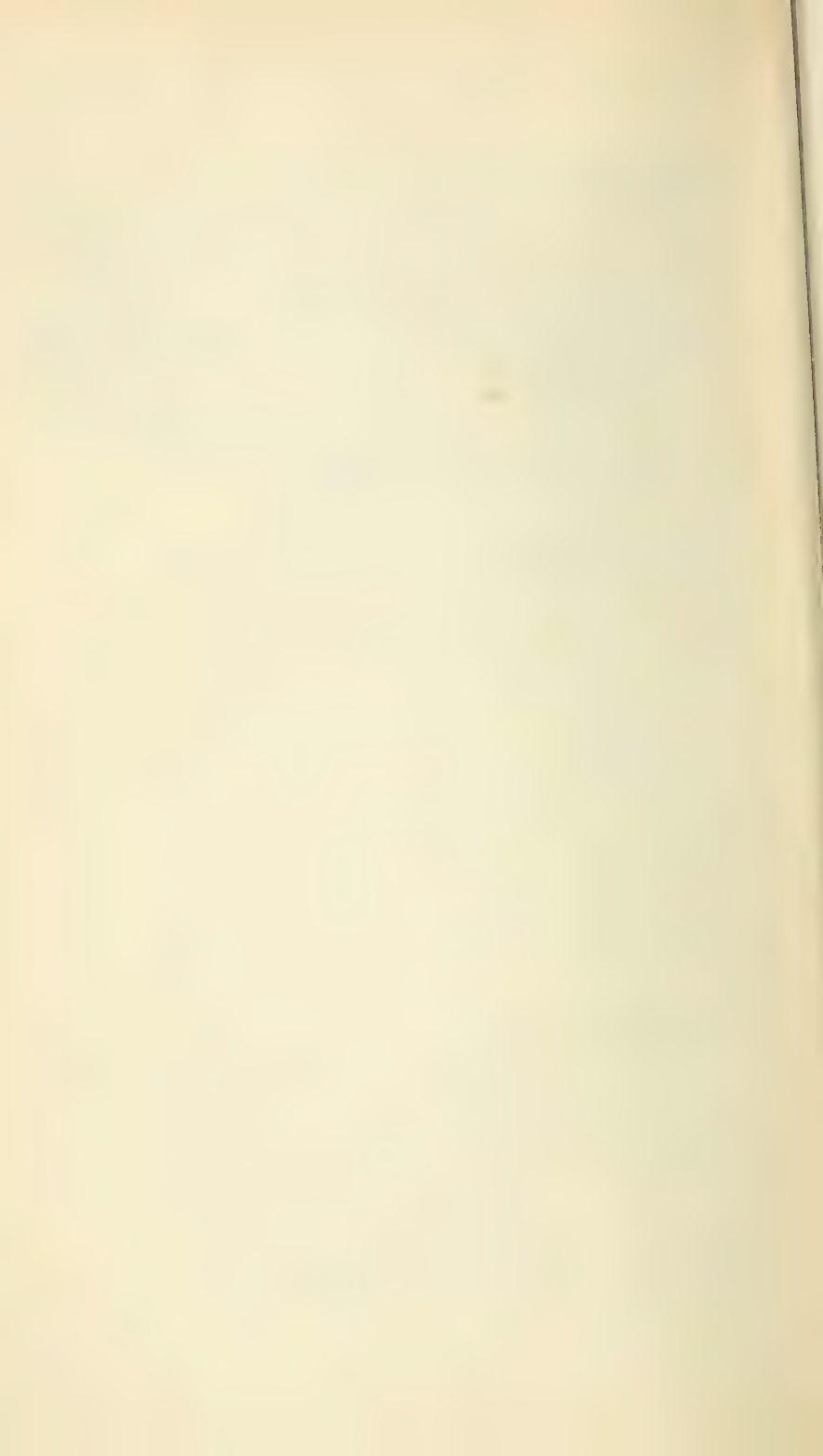
(*l*) *Haynes v. Mico*, 1 Bro. C. C. 129; *Devese v. Pontet*, 1 Cox, 188.

life, such a covenant will not be performed by the devolution of a share under an intestacy (*m*). intestacy
not per-
formance
of cove-
nant for
annuity.

(3.) Where the covenant is to pay a sum in the covenantor's lifetime, and there is a breach of the covenant before the death, then the devolution of a share in intestacy will not amount to a performance (*n*). Here the covenant having been to pay the settlor's wife a sum of money two years after marriage, and not having been complied with, there was an actual debt due when the intestate died, between which and her claim as widow in the intestacy, the covenantee could not be put to her election. Perform-
ance does
not apply
to a debt
due in
testator's
lifetime.

(*m*) *Couch v. Stratton*, 4 Ves. 391. 1, cited; 3 Atk. 420.

(*n*) *Oliver v. Brickland*, 1 Ves. sr.



PART II.

WHERE THE JURISDICTION RESTS ON THE DISTINCTIVE PROCEDURE OF EQUITY.

INTRODUCTION.

IT has been already pointed out, and cannot be too strongly urged, that it is impossible to draw any strictly defined line between those matters in which the jurisdiction of equity has arisen from the distinctive character of its principles, and those in which it is to be ascribed to the superiority or peculiarity of its procedure.

In many of the subjects which have been treated in the preceding part, it has been necessary to anticipate much that would appropriately present itself now for consideration, but which could not without serious inconvenience have been severed from the connexion in which it there stands. For instance, the subject of mortgages could not be examined without investigation of the method of accounting between mortgagor and mortgagee: no more was it possible to take a comprehensive view of the doctrine of trusts without trespassing on many questions which most usually present themselves in the course of the administration of assets.

On the other hand, in those matters in which the jurisdiction of equity is essentially administrative, or is otherwise due to its peculiar procedure, it of course recognises and applies as occasion requires all the principles already expounded. Thus actions arising out of partnerships

continually raise questions of trust and of fraud ; and as has been observed, the jurisdiction to relieve against the consequences of mistake is nowhere more frequently concerned than in actions for specific performance.

As it was necessary as an introduction to the first part of the work to inquire generally what the substantive principles were which distinguished equity from law, so it behoves us now to make a corresponding inquiry as to the distinctive procedure of Courts of equity. This must necessarily be here treated in a very general way, for otherwise we should be involved in an exposition of Chancery practice, which is beyond the province of this work.

Account.

Procedure
at common
law.

Perhaps the most extensively useful of the features of equitable procedure is the facility which it affords for the taking and adjusting of accounts. In actions at law, it was under the old practice necessary that the plaintiff should estimate his claim in a definite sum of money. Supposing the claim to be good in law, it was for the jury to determine on the facts whether the claim was reasonable or excessive, and to give their verdict accordingly. Of course, it was open to the defendant to adduce evidence generally and particularly to show that the plaintiff's claim ought to be reduced ; and simple cases of account might well be considered and adjusted by the jury. But it is evident that many cases arise in which the determination of what is justly due to a plaintiff necessarily involves long and difficult inquiries—for instance, it may be necessary to review a series of transactions extending over many years. For such an investigation a jury is clearly incompetent.

Inapplic-
able to
long
accounts.

Action of
account at
law.

Restric-
tions as to
parties.

This difficulty was very long ago recognised, and a remedy for it attempted apart from the assistance of equity. Indeed, one of the most ancient actions at law was the action of account. But the inadequacy of the remedy thus afforded is sufficiently shown by mentioning only a few of the conditions attached to it. Thus the action of account originally lay only when there was either privity in deed

by the consent of the party, as against a bailiff or receiver appointed by the party; or a privy in law, as against a guardian in socage. By the law merchant it was so far extended that a merchant might have an account against another, charging him as a receiver. Beyond these limits the action did not apply, until by successive statutes it was further extended to the executors of merchants, to administrators, and finally, so as to lie against executors and administrators of guardians, bailiffs, and receivers (*a*).

Nor were these restrictions as to the parties the only disadvantages. Even when the action was sustainable, the procedure under it was cumbrous in the extreme. The auditors appointed to take the account could not until 4 & 5 Anne, c. 16, examine the parties before them on oath. Whenever a disputed item was in question the parties might join issue thereon or demur and bring their dispute before the Court, and thus the inquiry might be almost interminably protracted. Moreover, no equitable claims, such as those arising from trusts, liens, frauds, &c., were recognised; so that after all the discussion at law, a suit in equity might still have been requisite to determine the full rights of the case (*b*).

It is not surprising that the legal action of account should under these circumstances have fallen into desuetude, and have been displaced by the remedy in equity to which its imperfections gave birth. We shall presently consider in greater detail some of the leading principles by which Courts of equity have been guided in the taking of accounts. It suffices now to illustrate the superiority of the equitable over the legal remedy, by stating that the master who acted as auditor in equity had abundant power to examine the parties on oath, to make inquiries from all proper parties by testimony on oath, and to require the production of all necessary documents; and that his decision was open to be re-examined by the Court whether in point of fact or of law, by a simple and expeditious process.

(*a*) 4 & 5 Anne, c. 16; Story, 415.

(*b*) Story, 448-9.

Defects as
to pro-
cedure.

Displaced
by the
equitable
remedy.

Superiority
illus-
trated.

Extent of
the juris-
diction in
equity.

The legal action of account having become obsolete, the jurisdiction of equity in all matters of complication was fully established, and, as usual, being once established, it was in no way interfered with by the fact that new powers were subsequently conferred on Courts of law; for instance, the power to compel a reference to arbitration under the Common Law Procedure Act, 1854 (*c*). The general test as to whether Courts of equity had jurisdiction in any particular case seems to have been the question whether or not the account could be competently examined upon a trial at *nisi prius* (*d*).

Fiduciary
relations
give juris-
diction.

In some cases it was necessary for the parties to resort to equity because of the existence of some fiduciary relation between them which prevented the application of a legal remedy. Thus a principal desiring an account against his agent could only obtain adequate relief in equity, since equity alone could enforce the discovery necessary to ascertain the facts of the case (*e*); in short, wherever the relation of trustee and *cestui que trust* exists the matter naturally falls under the jurisdiction of equity (*f*). An agent, however, could not sue in equity for an account against his principal, since no confidence is reposed by the agent, and the same ground of jurisdiction does not therefore exist (*g*).

Account
incident to
injunction.

In many cases, again, the remedy of account is incident to and accompanies that of injunction—for instance, in suits for the infringement of patents of copyright, and in respect of waste. These cases are more particularly referred to under the head of Injunction.

Since the Judicature Acts, questions as to jurisdiction can, of course, no longer arise, all actions being equally cognizable in both the Common Law and Chancery Divisions. But it remains a matter of propriety and convenience to resort to equity in such cases, the machinery of the equity

(*c*) 17 & 18 Vict. c. 125, s. 3.
(*d*) *O'Connor v. Spaight*, 1 S. & L.
305; *Taff Vale Co. v. Nicon*, 1 H.
L. 111.

(*e*) *Mackenzie v. Johnston*, 4 Mad.
373.

(*f*) *Docker v. Somes*, 2 My. & K. 664.

(*g*) *Padwick v. Stanley*, 9 Ha. 627.

Courts and Chambers being still conspicuous in their superior ability to enter into complicated accounts.

It is obvious that the jurisdiction of equity in matters of account brings a great variety of business within its purview. This is a natural consequence of the fact that an almost infinite variety of transactions involve questions of account; and, in addition to this, it is a well-established rule that when equity acquires jurisdiction on this ground, it extends its authority to other matters naturally, if not necessarily, attaching to such a jurisdiction. As incident to accounts, therefore, Courts of equity take "cognizance of the administration of personal assets, consequently of debts, legacies, the distribution of the residue, and the conduct of executors and administrators. As incident to accounts, they also take the concurrent jurisdiction of tithes, and all questions relating thereto; of all dealings in partnership, and many other mercantile transactions; and so of bailiffs, factors, and receivers" (*h*).

Extent of
the juris-
diction
founded on
account.

In dealing with the matters thus suggested, our course will be first to examine the most conspicuous of the principles by which equity is guided in the taking of accounts generally. Then we shall inquire with more particularity into the matters generally enumerated in the last paragraph, whose place in equitable jurisprudence is especially due to their involving matters of account.

Though we shall thus find that the heading of account is answerable for the greater part of the business which falls within the second division of our subject, there are other peculiar remedies or features of procedure scarcely less fertile, but which do not call for particular comment in this place.

Somewhat analogous in principle to the taking of accounts is the partition of lands, involving, as it does, minute inquiries and valuations. And very similar to this is the settlement of doubtful and confused boundaries.

Bound-
aries.

(*h*) Blackstone, Com. III. 437.

Specific
perform-
ance.
Injunc-
tion.

Another remedy of high importance, which has largely contributed to the excellence of equity, is that of Specific Performance. In some respects analogous to this is the remedy of Injunction.

The discussion of these remedies and the matters connected therewith is before us as constituting the second division of our subject.

CHAPTER I.

THE GENERAL PRINCIPLES OF ACCOUNT.

I. *Appropriation of Payments.*

Clayton's Case.

II. *Set-off.*1. *At Law.*2. *In Equity.*III. *Apportionment.*IV. *Contribution.*V. *Defences to an Action for Account.*

It has already been stated, and is very natural, that in taking an account, Courts of equity pay equal regard to the legal and equitable claims. Wherever any fraudulent dealing has given rise to a constructive trust, or to an equitable claim in any way, or by the dealings of the parties an equitable lien has been created, or indeed any doctrine of equity intervenes to modify the legal position of the parties, full effect is given thereto, and the result of the inquiry is therefore, when confirmed by the Court, final, needing no supplemental proceedings to complete the determination of the parties' rights.

I. *Appropriation of Payments.*

The accounts which come before Courts of equity are frequently of such a nature as to call for decision as to the appropriation of payments appearing on one side thereof, to the debits appearing on the other. In other words, it

often becomes material to ascertain to what debt a particular payment made by a debtor is to be applied. This question most commonly arises where there have been running accounts between debtor and creditor, various payments having been made and various credits given at different times.

The leading authority on this point is

CLAYTON'S CASE

[1 Mer. 572, 585],

Rules as
to appro-
priation.

from which we learn that the following rules, which are mainly derived from the Roman law, are applicable in equity.

Debtor has
first option.

1. A debtor making a payment has a right to appropriate it to the discharge of any debt due to his creditor.

The debtor may appropriate the payment by so stipulating in express terms (*a*), or his intention so to do may be inferred from the circumstances of the transaction; thus where one of the debts owing was secured and another unsecured, an intention first to discharge the secured debt was presumed (*b*).

Compared
with
Roman
law.

In the Roman law this case would have come under another rule—viz., that in the absence of an express appropriation by either debtor or creditor, the law would appropriate the payment to the most burdensome debt. This rule does not, however, appear to be recognised in English law (*c*), and it therefore seemingly requires something more than the mere fact that one of the debts is secured, to lead the Court to appropriate a payment to its extinction in priority to an unsecured debt of earlier date. In the case quoted it appears that the payment was made out of the proceeds of the security itself. See also *Att.-G. of Jamaica v. Manderson* (*d*), *City Discount Co. v. McLean* (*e*).

Debtor can

This right of appropriation by the debtor is, however,

(*a*) *Exp. Imbert*, 1 De G. & J. 152.

(*b*) *Young v. English*, 7 Beav. 10.

(*c*) *Mills v. Fowkes*, 5 Bing. N. S. 455, 461.

(*d*) 6 Moo. P. C.

(*e*) 9 L. R. C. P. 692.

lost unless exercised at the time of payment. If he does not then declare on what account the money is paid, he cannot afterwards do so (*f*).

2. If at the time of payment there is no express or implied appropriation thereof by the debtor, then the creditor has a right to make the appropriation.

In Roman law this right of the creditor, like the corresponding one of the debtor, was lost unless exercised at the time of payment (*g*). But in English law this is not so; and the creditor may, it seems, make the appropriation at any time after payment and before action brought or account settled between him and his debtor (*h*).

The creditor's right to make such appropriation is, however, subject to some limitations. He may not indirectly secure payment of an illegal debt by appropriating a general payment to its discharge (*i*). But a debt barred by the Statute of Limitations is not illegal, the statute being merely a bar to the remedy, not to the right; and if, therefore, a general payment is made, without appropriation by the debtor, it may be appropriated by the creditor to the discharge of a statute-barred debt (*k*). It must, nevertheless, be observed that it will not have the effect of reviving the debt (*l*); or, in other words, though by the appropriation the creditor may secure payment of a portion of a statute-barred debt, he does not by that means acquire a right of action for the remainder of it. But if a debt is not barred, a general payment on account appropriated towards its liquidation will take it out of the operation of the statute; that is to say, the statutory period will again commence to run from the time of such payment and appropriation (*m*).

3. In the absence of any appropriation by either debtor Appro-

(*f*) *Wilkinson v. Sterne*, 9 Mod. 427.

(*g*) Dig. 46, 3.

(*h*) *Philpot v. Jones*, 2 A. & D. 41, 44; *Simson v. Ingham*, 2 B. & C. 65.

(*i*) *Wright v. Laing*, 3 B. & C.

165.

(*k*) *Mills v. Fowkes*, *sup.*; *Nash v. Hodgson*, 1 Jur. N. S. 946; 4 De G. M. & G. 474.

(*l*) *Ibid.*

(*m*) *Ibid.*

priation by or creditor, an appropriation is made by presumption of law, according to the order of the items of account, the first item on the debit side being the item discharged or reduced by the first item on the credit side (*n*). This is the express point decided in *Clayton's Case* (*o*), and is abundantly confirmed by subsequent authority (*p*).

Presump- This presumption may, however, be rebutted by evidence tion may be re- of a different intention (*q*); and thus, though the English butted. rule falls short of that of Roman law already mentioned, there is a tendency in the same direction arising from the disposition to impute an intention to a debtor to appropriate his payment to the most onerous debt.

Payments Where a debt bearing interest stands against a debtor, appropriated to general payments made by him are first to be applied in interest first. payment of interest, any balance beyond what is necessary for that being then credited in reduction of the principal (*r*).

Presump- We have seen that a creditor may appropriate a pay- tion where ment towards the liquidation of a statute-barred debt. If some debts barred. however, there are several debts owing to him, some barred and some not so, and he does not expressly appropriate a payment made to him on account towards those that are barred, the presumption of law is that the payment is to be attributed to those not barred (*s*). In this respect, therefore, in the absence of an express appropriation, the law appropriates the payment to the best interest of the debtor. This evidently operates as a modification of the general rule that payments are appropriated by law to debts in order of time. It scarcely needs to be remarked by way of caution that in a continuous and current account the early debts, however old, are not statute-barred, being kept alive from time to time by any payments which are made within six years of their having been incurred.

(*n*) Coote, Mtges., p. 1133.

(*o*) 1 Mer. 585.

(*p*) *Pemberton v. Oakes*, 4 Russ. 154, 168; *Bk. of Scotland v. Christie*, 5 Cl. & F. 214.

(*q*) *City Discount Co. v. McLean*, 9 L. R. C. P. 692.

(*r*) *Chase v. Box*, Freem. 261.

(*s*) *Nash v. Hodgson*, 6 De G. M. & G. 474.

Questions of appropriation, perhaps, most frequently arise in cases where a firm has from time to time been changed, and eventually fails. It is to such cases that the rule in *Clayton's Case* especially applies. If a creditor seeks to fix a liability for the ultimate balance on a person who has been a partner during the currency of the account, but who is not so at the time of the failure, the account will be taken on the presumption that the sums first paid in have been first drawn out, or that the debts first incurred have been first discharged. And no liability can be fixed on a former partner if, on working out this principle, it appears that all the debts owing when he ceased to be a partner have been subsequently discharged.

II. *Set-off*.

There has been a marked distinction between the principles of law and equity as to the set-off of debts one against another.

1. Courts of law, indeed, always applied the principle of set-off to connected accounts of debit and credit, and allowed only the balance of the account to be recovered (*t*). But apart from legislation the principle was confined within very narrow limits. The mere existence of cross-demands between the same persons did not entitle one to set-off the debt owing to him against that which he owed. Unless they were substantially connected one with the other, the respective creditors could only sue in independent actions. For instance, if A. was indebted to B. in the sum of £5000 on a bond, and B. subsequently borrowed £4000 from A. also on a bond, payable at a different time or under different conditions from that of A., there was no legal set-off between them, and B. could have sued A. and obtained and enforced judgment against him for the whole £5000, even though it may have been certain that B. would be unable to pay his debt when it became payable.

(*t*) *Dale v. Sollet*, 4 Burr. 2133.

Statutory
improve-
ments.

It is unnecessary now to trace the steps by which the manifest imperfections of the law in this respect were from time to time removed by statutory interference. It suffices to say that the repugnance of its doctrines to natural equity sufficed to establish an equitable jurisdiction in many cases where set-off was reasonable, but was inadmissible at law.

Distinc-
tions as to
set-off in
equity.

2. This jurisdiction was, however, subject to well-defined limitations, and generally followed the law. The cases in which equity differed from the law may generally be classed under one or other of three headings.

Where
credit is
mutual.

(1.) Notwithstanding that the debts in question arise from independent transactions, yet equity allows a set-off where, from the circumstances of the case, it appears that the party incurring the second debt acted in reliance on the former debt as a means of discharging it.

This is sometimes expressed by saying that though the debts are independent, the credit is mutual. It is illustrated by the case above put of the bonds given between A. and B. In such a case the nature of the transaction would lead to the presumption that A. lent his money relying on the fact that on another account he was indebted to B., so that if B. should become insolvent A.'s advance should be esteemed a *pro tanto* payment of his liability. Equity gives effect to this presumption, though, apart from the statutes referred to, it was disregarded at law (*u*). Similarly it was held at law under the statutes, that there was a mutual credit wherever one party being indebted to another entrusted him with goods, mutual credit being defined as meaning mutual trust, which must be presumed in such circumstances (*v*).

Where one
of the
debts is
equitable,

(2.) Where there are cross-demands of such a nature that if both had been recoverable at law they would have been subject to set-off, then if one of the demands is of

(*u*) *Lancashire v. Jones*, 1 P. Wms. 326; *Exp. Prescott*, 1 Atk. 230.

(*v*) *Olive v. Smith*, 5 Taunt. 56; *Key v. Flint*, 8 ib. 21.

an equitable nature the principle of set-off is applicable in equity.

This was the case where, prior to the Judicature Acts, a legal debt was owing to a plaintiff by a defendant, and the defendant was assignee of a legal debt due to a third person from the plaintiff; then if the debts were of such a nature that they might have been set-off in law under the statutes, they were subject to set-off in equity (*w*).

It is evident that this class of cases is rendered completely obsolete by the Judicature Acts.

(3.) There are certain cases where on special equitable grounds set-off is allowed in equity.

Thus though in equity no more than at law is it permitted to set-off debts accrued in different rights (for instance, a joint debt against a separate debt, or *vice versa*; or a debt due from a person individually against a debt due to him as executor of another), yet where a joint creditor has been guilty of fraud in relation to the separate property of one of the debtors—for instance, has misapplied it, and deceived the latter—it has been held that in case of bankruptcy, the separate debt arising by such misapplication may be set-off against the joint debt (*x*). So also in cases where one of the joint debtors has been only surety for the other, he may set-off the debt due to his principal from the creditor; and, generally, a joint debt may in equity be set-off against a separate debt where it is clear that joint credit was given on account of the separate debt (*y*).

On similar principles, though, generally speaking, a debt incurred by a person in his private capacity could not be set-off against a debt due to him as executor or trustee (*z*), nor a debt due from a testator be set-off against a debt due to his executor (*a*), yet special circumstances, such as an identity of interest in the two debts,

as formerly
in assign-
ments of
debts.

Where
there are
special
grounds.

Debts
occurring
in different
rights.

When
joint and
separate
debts set-
off fraud.

Surety-
ship.

(*w*) *Clarke v. Cort*, Cr. & Ph. 154;
Williams v. Davies, 2 Sim. 461.

(*x*) *Exp. Stephens*, 11 Ves. 24;
Exp. Blagden, 19 Ves. 465, 467.

(*y*) *Vulliamy v. Noble*, 3 Mer. 593,

621; *Exp. Stephens*, *sup*.

(*z*) *Freeman v. Lomas*, 9 Ha. 109;
Exp. Kingston, 6 Ch. 632.

(*a*) *Lambarde v. Older*, 17 Beav.
542.

may suffice to give a right of set-off, notwithstanding the formal difference as to the characters (*b*).

Set-off
disallowed
in winding-
up:

(4.) *Vice versa*, the equity of third persons will sometimes intervene to prevent a set-off, when otherwise it might have been allowed. Thus a shareholder in a limited company who is also a creditor, cannot, in the compulsory winding-up of the company, set-off the amount due to him as creditor against the amount due from him for calls (*c*). He must pay his calls in full, and then stand on the same footing as other creditors in respect of the debt due to him. It was, however, held at law that in a voluntary winding-up a set-off of this nature could be claimed, the Companies Act having made no provision for it (*d*). A similar set-off is also allowable where the shareholder is bankrupt, whether the claim is made in the bankruptcy or in the winding-up; that is to say, whichever way the balance is (*e*). These cases are governed by the express enactment of the Bankruptcy Act, that in bankruptcy, where there have been mutual dealings between the bankrupt and a person proving in the bankruptcy, the sum due from one party shall be set-off against any sum due from the other party (*f*).

allowed in
bank-
ruptcy.

III. *Apportionment.*

Apportion-
ment.

The principles of equity applicable to account are further distinguished from those of law by its fuller application of the doctrine of apportionment.

Contracts.

Examples of this have already been given; for instance, in the case of an apprenticeship prematurely determined (*g*). Other cases of contracts which were not divi-

(*b*) *Bailey v. Finch*, 7 L. R. Q. B. 34.

(*c*) *Grissell's Ca.*, 1 Ch. 528; Comps. Act, 1862, 25 & 26 Vict. c. 89, s. 101.

(*d*) *Brighton Arcade Co. v. Dowling*, 3 L. R. C. P. 175.

(*e*) *In re Duckworth*, 2 Ch. 578; *Exp. Strang*, 5 Ch. 492.

(*f*) 32 & 33 Vict. c. 71, s. 29.

(*g*) *Hale v. Webb*, 2 Bro. C. C. 78; *supra*, p. 203; *Hirst v. Tolson*, 13 Jur. 596.

sible at law form equally apt illustrations: thus if a contract to serve for a year for £100 was determined by death at the end of nine months, no remuneration at all could have been legally recovered (*h*). In such cases equity will grant redress wherever it discovers circumstances of mistake, accident, or fraud (*i*).

Rents, again, were at common law not apportionable, Rents. and the consequences of this doctrine were continually productive of injustice when a tenant for life died in the interval between two rent days. The full consideration of the difficulties thus arising is not, however, here required, equity having so far followed the law as to render necessary a resort to the legislature (*h*). By the statutes 11 Geo. II. c. 19, and 5 Will. IV. c. 22, the greatest of the inconveniences were removed; and now, by the Appor- Apportion-
tionment Act, 1870 (*l*), it is provided that in future all rents ment Act,
and other periodical payments in the nature of income 1870.
shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly (*m*).

Previous to this Act, there were, however, some cases in which apportionment might have been had in equity, though not in law. Thus where portions were payable to daughters at eighteen or marriage, and until then maintenance was allowed, if a daughter came of age or married in the intermediate period, maintenance was apportionable in equity (*n*).

IV. Contribution.

The principle of contribution, although in most cases Contribu-
recognised at common law, was capable of much more tion.

(*h*) Story, 471; *Corp. of Plymouth v. Throgmorton*, 1 Salk. 65; 3 Mod. 153.

(*i*) Story, 472.

(*k*) But see *Meeley v. Webber*, cited, 2 Eq. Abr. 704; *Aynsley v. Woods-*

worth, 2 V. & B. 331.

(*l*) 33 & 34 Vict. c. 35.

(*m*) s. 2.

(*n*) *Hay v. Palmer*, 2 P. Wms. 501.

Lands
subject to
charge.

convenient application under the procedure of equity. At law, where lands subject to a charge were subjected to a partition, or sold in lots, one of the several owners paying the charge could recover contribution from the others; but his remedy lay in actions against them individually, whereas equity could ascertain the proportions, and finally determine the question by one judgment in one suit. The principles of contribution as between sureties have been already fully considered (*n*).

V. *Defences to an Action for Account.*

Settled
account.

1. When an account has been once settled, and a balance struck, equity will not usually interfere, the remedy at law for the recovery of the balance being complete (*o*). The fact of such a settlement, therefore, usually affords a conclusive defence to an action for an account; and extensive lapse of time naturally adds to the weight of the defence.

What
amounts
to settle-
ment.

In such cases it is often a matter of dispute whether a settlement has or has not in fact been concluded. A formal examination and signature of the account by the parties is the best evidence of such a settlement; but other circumstances may suffice to evidence a binding acceptance of the account (*p*). Where, for instance, an account has been delivered, and no objection is made within a reasonable time, the extent of which will of course depend upon the nature of the account, acquiescence thereto will be implied, and the account will be deemed a stated account (*q*). The mere delivery of an account will not, however, suffice to establish the fact of a settlement (*r*).

When
accounts
re-opened.

When in an action for an account the defence alleges a settlement, one of two courses may be open to the plaintiff. In some circumstances equity will not refuse to

(*n*) p. 327, *et seq.*

(*o*) *Dawson v. D.*, 1 Atk. 1.

(*p*) *Willis v. Jernegan*, 2 Atk. 251.

(*q*) *Ibid.*

(*r*) *Irving v. Young*, 1 S. & S.

333.

reopen the account, notwithstanding a settlement. The most potent of these is fraud. Thus if the parties to the settlement were not on equal terms, and it appears that one has been deceived, or has acted under duress, equity will grant relief (s). Such cases fall under the general principle of relief against fraud, which has already been considered. Similarly, on grounds of mistake or accident, equity will sometimes reopen an account; and this will always be done the more readily where there is a confidential relation between the parties, such as that of trustee and *cestui que trust*, or solicitor and client (t). When an account is thus wholly reopened, it is, of course, taken as at first, the burden of proof resting on each party to prove that which he claims to stand to his credit.

But in other cases, though there may not be sufficient grounds to induce the Court wholly to reopen the account, it may grant leave to the plaintiff to surcharge and falsify, the effect of which is to throw on him alone the burden of proving any omission or error. If he can establish the omission of some item in his favour, it will be allowed as a surcharge; if an error, the falsification will be rectified; but the *onus probandi* is wholly on him, the account, as a whole, being deemed *primâ facie* correct (u). Questions of law, as well as of fact, may be raised upon leave to surcharge and falsify (x).

2. Unless excluded by the existence of an express trust, the Statute of Limitations applies to an action for an account in equity as well as at law; and not only so, but equity sometimes refuses to interfere with accounts on the ground of *laches*, though not extending to the statutory period. The maxim, "*Vigilantibus non dormientibus æquitas subvenit*," is peculiarly applicable to such cases as those in question, the proofs in which are so liable to destruction by lapse of time.

(s) *Vernon v. Fawdry*, 2 Atk. 119;
Clarke v. Tipping, 9 Beav. 284.

(t) *Matthews v. Wallwyn*, 4 Ves.
125; *Todd v. Wilson*, 9 Beav. 486.

(u) *Pitt v. Cholmondeley*, 2 Ves.
sr. 565.

(x) *Roberts v. Kufjin*, 2 Atk. 112.

CHAPTER II.

THE ADMINISTRATION OF ASSETS.

SECTION I.—ADMINISTRATION GENERALLY.

I. *What is meant by Assets.**Distinctions between Legal and Equitable Assets.*II. *The Priority of Debts.*III. *Order of Administration.**Ancaster v. Mayer.*IV. *Payment of Mortgage Debts.*V. *Marshalling of Assets.**Aldrich v. Cooper.*VI. *Marshalling of Securities.*I. *What is meant by Assets.*Assets
defined.

1. Under the ancient common law the debts of a deceased person were always payable out of his personal estate. The personal estate vested in the legal personal representative as soon as constituted, and to him the creditor must resort for satisfaction. But the personal representative, whether executor or administrator, was only chargeable to the extent of the personal estate of the debtor in his hands. This was termed "assets." The completeness of the creditor's remedy depended upon whether it was "*asset*," or sufficient to meet all the debts.

2. It was for a long time quite dependent upon a person's option whether or not his real property should be available for the payment of debts, in case the personalty should prove insufficient. He might bind his heirs by deed or specialty to the payment of any debt or the fulfilment of any contract, to the value of the lands descending. In this case the position of the heir with respect to such specialty debts was similar to that of the executor or administrator with respect to debts generally; and the lands so descended were then termed real assets, or assets by descent. But the heir was not at all bound unless he was named in the deed or covenant, and, since he was only liable in any case to the extent of lands descending, the expectation of the specialty creditor, even when the heir was named, was wholly defeated if the testator devised his real estate away from his heir. There was no law to charge the devisee, and the heir took nothing to be charged.

3. At length a statute was passed commonly known as the Statute of Fraudulent Devises (*a*), which made void all devises by will as against creditors by specialty in which the heirs were bound. Still, creditors who had not fortified themselves by securing a bond or covenant under seal were at the mercy of their debtor so far as concerned his real estate. The next step in their favour was taken in 1807, when, by 47 Geo. III. c. 74, the fee simple estates of deceased *traders* were rendered liable to simple contract as well as to specialty debts. In 1833 this remedy of creditors ceased to be confined to the case of traders, it being enacted by 3 & 4 Will. IV. c. 104, that all fee simple estates not charged with or devised subject to the payment of debts, should be liable to be administered in the Court of Chancery for the payment of all the just debts of the deceased owner, whether by simple contract or specialty. By these steps fees simple estates at length became assets for the payment of all debts.

Real
assets.Statutory
real assets;
3 & 4
Will. & M.
c. 14;47 Geo.
III. c. 74;3 & 4
Will. IV.
c. 104.

(*a*) 3 & 4 Will. & M. c. 14.

Equitable
assets.

4. But meanwhile the honesty of testators had devised a means by which creditors might obtain a satisfaction out of their real estate which the law did not afford them. It became a common thing for testators to expressly devise their lands to trustees upon trust for sale for the payment of their debts; or, which was, so far as concerned creditors, the same in effect, to charge their lands in the hands of the devisees with the payment of their debts. It is evident that the lands thus expressly made available for creditors were in a very different position from lands descending, or made legally liable to debts by statute. In the case of lands devised on trust for sale for or charged with payment of debts, the legal personal representative had nothing at all to do with them. The funds in his hands were the same as before, and to avail themselves of the testator's directions in their favour the creditors could not sue the executor or administrator, but were required to proceed in Chancery for the performance of the trust created in their favour. The lands thus brought within their reach were termed *equitable assets*.

How dis-
tinguished
from
legal
assets.

It will be observed that the distinction between legal and equitable assets does not at all relate to the nature of the title to the property itself. Thus an equity of redemption of a leasehold is of course an equitable interest; but it would none the less, on the death of the owner, become legal assets, because it would devolve upon the personal representative. The real test is whether or not the property comes to the executor *virtute officii*. If it does, it forms legal assets; if it does not, but the creditor has to resort to the Court of Chancery to secure the benefit of it, it is equitable assets. The distinction thus refers to the remedy of the creditor, not to the nature of the property (*b*).

Species of
equitable
assets.

Nor are lands thus devised on trust for sale or charged with debts the only species of equitable assets. The same principle which distinguishes them from legal assets

(b) *Cook v. Gregory*, 3 Drew, 549.

includes also the separate estate, whether real or personal, of married women, this being a creature of equity, and its liability to debts being recognised only in equity (c); and it has been held that separate estate arising under the Married Women's Property Act, 1870, is subject to the same rules (d). For the same reason—namely, that it does not come to the hands of an executor *virtute officii*—property over which a testator has exercised a general power of appointment is equitable assets (e).

Until quite recently the distinction between legal and equitable assets was of great importance. In the administration or distribution of legal assets, a certain definite order of priority was observed between different species of debts. This order we shall presently consider in greater detail; at present it suffices, by way of illustration, to state that creditors by specialty were entitled to be paid in full before any payments were made to those whose claims arose from simple contracts. And when all debts were made recoverable out of real estates by the statute of 1833, this order of priority was not interfered with. The Court of Chancery, however, has always observed as a maxim that "Equality is equity." In its distribution of equitable assets, therefore, it disregarded the legal rules as to priority, and treated all creditors, whatever the nature of their claims, *pari passu*. Moreover, it went farther than this in its favour of equality. Where there was a mixed fund of legal and equitable assets, and the specialty creditors, availing themselves of their priority with respect to the former, exhausted them, so as to leave nothing for the simple contract creditors, equity would not suffer any specialty creditor to receive any part of the equitable assets until the simple contract creditors were paid up to an equality with what the specialty creditors received from the legal assets (f).

Character-
istics of
equitable
assets.

(c) *Owens v. Dickenson*, Cr. & Ph. 48.

(d) *Thompson v. Bennett*, 6 Ch. D. 739.

(e) *Pardo v. Bingham*, 6 Eq. 485.

(f) *Plunket v. Penon*, 2 Atk. 290; *Bain v. Sadler*, 12 Eq. 570.

It has been observed that the creation of equitable assets was not interfered with by 3 & 4 Will. IV. c. 104, lands devised charged with debts or on trust for their payment being excepted from its operation. The same exception had been made in 3 & 4 Will. & M. c. 14. One consequence, therefore, of the equitable method of distribution of equitable assets, was that a testator who had at law given a creditor the security of a bond, or other specialty binding his heirs, might defeat the legal priority thus bestowed by devising his realty charged with debts, and by this means placing its distribution in the hands of Chancery.

32 & 33
Vict. c. 46.

5. Two recent statutes have, however, to a great extent destroyed the importance of the distinction between legal and equitable assets. First, by 32 & 33 Vict. c. 46, it is enacted that, "In the administration of the estate of every person who shall die on or after the 1st day of January, 1870, no debt or liability of such person shall be entitled to any priority or preference by reason merely that the same is secured by or arises under a bond, deed, or other instrument under seal, or is otherwise made or constituted a specialty debt; but all the creditors of such person, as well specialty as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of the assets of such deceased person, whether such assets are legal or personal, any statute or other law to the contrary notwithstanding; provided, also, that this Act shall not prejudice or affect any lien or charge, or other security which any creditor may hold or be entitled to for the payment of his debt."

Judicature
Act, 1875,
s. 10.

6. Again, by sect. 10 of the Judicature Act, 1875 (*g*), it is enacted that, "In the administration by the Court of the assets of any person who may die after the commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities . . . the same rules shall prevail and be observed as to the re-

(*g*) 38 & 39 Vict. c. 77.

spective rights of secured and unsecured creditors, and as to debts and liabilities proveable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt."

The former of these statutes came into operation on the 1st January, 1870, the latter on the 1st November, 1875 (*h*). As to persons who died before the end of 1869, the old rules as to priority in administration therefore remain applicable; and as to persons who died between that date and the 1st of November, 1875, the old rules apply, except that specialty and simple contract creditors stand on the same footing. As cases still occur to which neither of the statutes apply, the old law cannot yet be treated as obsolete; and it is accordingly necessary in considering the details of administration to distinguish between the three periods indicated.

II. *Priority of Debts.*

1. *Before 32 & 33 Vict. c. 46.*

The following is the order in which the executor was and is required to pay out of legal assets the debts owing by testators who died previous to the 1st of January, 1870:

(1.) Debts due to the Crown by record or specialty. Debts to Crown by record or specialty.
 Debts not of record or specialty have not absolute priority, but they nevertheless have priority over debts of equal degree due to subjects (*i*).

(2.) Debts to which particular statutes give priority— Statutory priority.
 for instance, poor rates, by virtue of 17 Geo. II. c. 38; regimental debts, by virtue of 26 & 27 Vict. c. 57; certain liabilities to building societies (*k*), and to friendly societies (*l*).

(3.) Judgment debts duly registered. Final decrees, and Registered judgments,

(*h*) *Sherwin v. Selkirk*, 12 Ch. D. 68.

(*i*) *Re Henley & Co.*, 9 Ch. D. 481.

(*k*) 4 & 5 Will. IV. c. 40, s. 12.

(*l*) 38 & 39 Vict. c. 60, s. 15.

and judgments
against
executor.

orders of Courts of equity ordering money to be paid to a person, have the same effect as judgments (*m*). *Pari passu* with such judgments and decrees rank judgments recovered against the personal representative himself, even though unregistered (*n*).

Registration was required of judgments against the deceased debtor, for the protection of the personal representative, who would otherwise be subject to unavoidable loss by exhausting the assets in paying debts of inferior degree, and then finding himself liable to a judgment debt of which he had no knowledge. Of course, in the case of a judgment against himself, no such reason applied to deprive the creditor of the reward of his superior diligence.

Statutes
and recog-
nizances.

(4.) Debts of record other than judgments—*e.g.*, statutes and recognizances. Statutes have long been obsolete. Recognizances are, however, continually employed—for instance, they are required from persons appointed by the Court of Chancery as receivers.

Specialty
debts.

(5.) Debts by specialty contracts for valuable consideration, whether the heir is or is not bound. A mere recital of a debt in a deed does not constitute it a specialty debt. It is necessary that it should be created, or at least novated, by the deed (*o*).

Arrears of rent service rank equally with debts by specialty, even though the rent be reserved by parol. The liability of a contributory in the winding-up of a company under the Companies' Act, 1862, is also of the nature of a specialty debt (*p*). A voluntary bond assigned for value in the lifetime of the obligor was held to rank as a specialty (*q*).

Unregis-
tered judg-
ments
against

(6.) Unregistered judgments against the deceased debtor, and debts by simple contract. These comprise debts due on negotiable instruments, and also liabilities in respect of

(*m*) 1 & 2 Vict. c. 110, s. 18; *Wilson v. Dunsany*, 18 Beav. 299.

(*n*) *Williams v. W.*, 15 Eq. 270.

(*o*) *Iven v. Elwes*, 3 Drew, 25.

(*p*) *Buck v. Robson*, 10 Eq. 629.

(*q*) *Payne v. Mortimer*, 4 De G. & J. 447, 452.

breaches of trust not being breaches of covenant under seal (*r*).

(7.) A claim by an incumbent against the representatives of his predecessor for dilapidations (*s*).

(8.) Voluntary bonds or covenants in the hands of a volunteer. These, though postponed to all contract debts, were considered by virtue of their antecedent legal title to have priority over legatees (*t*). The holder of a voluntary bond may, moreover, sustain a creditor's suit for administration, and his claim is preferred to a claim for interest upon debts which do not carry interest at law (*u*).

Such is the order of payment so far as unaffected by legislation. Before considering the effects of the statutes which have modified it, it may be well to mention certain liabilities and powers of executors which have special reference to the rules as to priority.

2. *Rights and liabilities of executors, &c.*

(1.) An executor who, having notice of a superior debt, voluntarily paid one of inferior order, thereby rendered himself personally liable, in case of a deficiency of assets, to pay the former debt. He was at one time presumed to have notice of judgments and decrees in equity against the deceased. But from the hardship which thus threatened him he was relieved by various statutes, which rendered such judgments of no effect against him unless docketed or registered (*v*). As regards other debts, he was not liable, except in case of actual notice (*x*).

(2.) Among creditors of equal degree an executor might pay one in preference to another (*y*).

(3.) An executor or administrator, to whom a debt, whether legal or equitable, was owing by the deceased person, had a right to retain his debt out of the legal assets

(*r*) *Adey v. Arnold*, 2 De G. M. & G. 432.

(*s*) *Bryan v. Clay*, 1 E. & B. 38.

(*t*) *Fletcher v. F.*, 4 Ha. 74.

(*u*) *Garrard v. Dinorben*, 5 Ha. 213.

(*v*) 4 & 5 Will. & M. c. 20; 1 & 2

Vict. c. 110; 2 & 3 Vict. c. 11; 23 & 24 Vict. c. 38.

(*x*) *Brooking v. Jennings*, 1 Mod. 175.

(*y*) *Lyttleton v. Cross*, 3 B. & C. 317, 322.

deceased, and simple contract debts.

Claim by incumbent.

Voluntary bonds and covenants.

Executor's liability to creditors.

Power of preference.

Retainer.

in priority to other creditors of equal degree (z). An executor of an executor or administrator might similarly retain for a debt due to the executor or administrator (a). And a husband who was executor might retain for a debt due to his wife, or, if his wife was executrix, might retain for a debt due to himself or his wife (b).

No such rights of retainer existed with respect to equitable assets; but though the Judicature Act has, as far as regards the order of distribution, in some respects put equitable and legal assets upon the same footing, it has been held that it does not interfere with the well-established right of retainer out of legal assets (c).

When executor not liable.

There are two ways in which a legal personal representative may secure himself from his primary liability for the debts of the deceased. First, by throwing the administration into the hands of the Court. As long as the estate is being administered, the creditor's remedy is of course to prove his debt therein. When the administration is complete, his only resource is to follow the assets into the hands of the residuary legatee or next of kin (d). Secondly, the legal personal representative may obtain a statutory protection under 22 & 23 Vict. c. 35, s. 29, by issuing regular notices, and distributing the estate in accordance therewith. If, however, he administers out of Court on his own responsibility, he remains *prima facie* liable to the claim of any unpaid creditor, though if required to pay a debt of which at the time of distribution he had no notice, he would be entitled to call upon the residuary legatee or next of kin to refund (e).

3. *Priority of debts under 32 & 33 Vict. c. 46.*

Effect of 32 & 33 Vict. c. 46.

We have seen that this Act places specialty debts on the same level and footing as debts by simple contract. And

(z) <i>Cockcroft v. Black</i> , 2 P. Wms. 208.	(c) <i>Lee v. Nuttall</i> , 12 Ch. D. 61 ; <i>Richmond v. White</i> , <i>ib.</i> 361.
298.	(d) <i>Thomas v. Griffiths</i> , 2 Giff. 504 ; 2 De G. F. & J. 555.
(a) <i>Hopton v. Dryden</i> , Prec. Ch. 180 ; <i>Weeks v. Gore</i> , 3 P. Wms. 184, n.	(e) <i>Jerris v. Wolfestan</i> , 18 Eq. 18.
(b) <i>Atkinson v. Rawson</i> , 1 Mod.	

it includes in its operation those other debts which we have mentioned as previously ranking with specialty debts—viz., debts due from contributories in the winding-up of companies and arrears of rent (*f*).

With this exception, however, the order remains as before. Debts to the Crown, judgments, and other debts of record retain their former position. And this being so, a creditor in an administration under this Act who secures a judgment against an executor for a simple contract debt, thereby actually gains priority over a creditor by special contract (*g*). The executor's right of retainer was not affected by this Act (*h*).

4. *Priority under the Judicature Act, 1875 (i).*

The above quoted section of this Act has in some respects completely changed the method of administration as regards the debts of persons dying since the 1st of November, 1875; but nevertheless the effect of this enactment does not appear to be so extensive as at first sight one might suppose.

In the first place, its application is confined to cases of the administration by the Court of *insolvent* estates. Thus where the assets of a person are sufficient to meet his liabilities, the order of payment remains as before; a matter which is in this case of course of very little moment. And again, where no recourse is had to the Court for the administration of insolvent estates, the priorities of creditors are determined by the old law.

Further, the law of bankruptcy is by this section, even when it operates, only to be applied in three respects: (1) As to respective rights of secured and unsecured creditors; (2) As to the debts and liabilities proveable; (3) As to the valuation of annuities and future and contingent liabilities. It is only the first of these heads which can affect the rules as to priorities now under view.

(*f*) *Shirreff v. Hastings*, 6 Ch. D. 610.

(*g*) *Hanson v. Stubbs*, 8 Ch. D. 154.

(*h*) *Crowder v. Stewart*, 16 Ch. D. 368.

(*i*) 38 & 39 Vict. c. 77.

Effect of
Judicature
Act, s. 10.

Applies to
insolvent
estates
only.

How far
rules of
bank-
ruptcy
applied.

The question is, to what extent it modifies the previous law.

Secured
debts.

In one respect the change introduced is obvious. In equity a mortgagee has always been allowed to pursue all his remedies concurrently; his enforcement of one does not prejudice him in the prosecution of another; he may at the same time sue personally for his debt, and proceed to enforce his specific security by foreclosure or sale. It was held in an important case (*k*) that the death of the mortgagor made no difference to this right, and that thus in the administration of his estate the mortgagee might share rateably with other creditors by proving for the full amount of his debt against the estate; and having received his dividend, might proceed to realise his security, and retain thereout the whole balance due to him. He might thus receive twenty shillings in the pound, while the unsecured creditors had to be satisfied with a small dividend.

Mason v.
Bogg.

Rule in
bank-
ruptcy.

Under the Bankruptcy Act, 1869, the position of a mortgagee or other secured creditor is, however, much less advantageous. By s. 40 of that Act, he is required to elect whether he will prove for his whole debt, and at the same time give up his security for the benefit of the estate; or whether he will retain his security, and after valuation, or sale of it, prove only for the balance of his debt. The effect of his security is thus not prejudiced, but as regards the balance of his debt he is in no better position than any other creditor; and if not fully secured, he cannot receive twenty shillings in the pound unless the unsecured creditors do so also.

Judicature
Act.

The effect of the Judicature Act, then, is clearly to substitute this rule for the rule established by *Mason v. Bogg* (*l*) in the administration by the Court of insolvent estates. But the language of the Act might lead to the supposition that the assimilation to the bankruptcy law would extend further than this. Certain priorities among debts are definitely laid down in the Bankruptcy Act. By s. 32,

(*k*) *Mason v. Bogg*, 2 My. & Cr. 443. (*l*) *Sup.*

certain rates and taxes and certain wages and salaries are to be paid before general debts, and with these exceptions all debts proveable under the bankruptcy are to be paid *pari passu*. Now these preferential debts are quite different from those to which priority was given in administration. The difference is two-fold; there is a conflict on both sides. On the one hand, bankruptcy gives no priority to judgments registered or unregistered, or to recognizances, over simple contract debts; on the other hand, in administration no preference was shown for wages and salaries. Have, then, the words of the Judicature Act the effect of abolishing the old rules of priorities in cases of administration by the Court, and substituting for them the preferences provided for by the Bankruptcy Act?

It seems that this question must be answered in the negative. In *Lee v. Nuttall* (*m*), James, L. J. said: "The sole object of the 10th section, as it appears to me, was to get rid of the rule in Chancery under which a secured creditor could prove for the full amount of his debt and realise his security afterwards, and to put him on the same footing as in bankruptcy." Again, the executor's right of retainer, which has nothing corresponding to it in bankruptcy, has been held to remain as it was before the Act (*n*). It has further been decided that in the winding-up of companies to which the same words in the same section apply, the preferences recognised in bankruptcy do not operate (*o*), from which it seems almost a corollary that the old priorities are not displaced. More recently still it has been expressly decided that in administration a judgment creditor has still the same priority as he had before the Act (*p*).

We conclude, then, that the Judicature Act, 1875, has

(*m*) 12 Ch. D. 61.

(*n*) *Ibid.*; *Richmond v. White*, 12 Ch. D. 361.

(*o*) *Re Albion & Co.*, 7 Ch. D. 547; *Re Withernsea Brickworks*, 16 Ch. D. 337.

(*p*) *Smith v. Morgan*, 5 C. P. D.

337. See also *In re Printing & Co.*, 8 Ch. D. 535; *In re Taylor*, *ib.* 188; *In re Coal Consumers' Assoc.*, 4 Ch. D. 630; *In re Richards & Co.*, 11 Ch. D. 681; *In re W. of E. Bank*, 12 Ch. D. 825; *In re Association of Land Financiers*, 16 Ch. D. 373.

not affected the rules as to priority, and that they therefore remain as they were placed by 32 & 33 Vict. c. 46.

III. *Order of Administration.*

Such being the order of priority *inter se* of the creditors of a deceased person, the next inquiry is as to the order in which the assets will be applied in the discharge of the liabilities. This inquiry in effect ascertains the respective priorities of the various classes of persons who claim to take the deceased's estate beneficially.

Rights of
creditors
not
affected by
order.

It will, of course, be remembered in considering this question, that the points now to be raised do not in any way interfere with a creditor's rights. His remedies extend to the whole of the assets, and are not prejudiced by any claims which the different classes of legatees, devisees, &c., may have *inter se*. Under the head of Marshalling we shall see how those claims are adjusted, if the creditor, in pursuance of his rights, resorts to the assets in an order contrary to that which the law prescribes as between the beneficiaries.

General
personalty
first liable.

1. It was well established in the case of

ANCASTER v. MAYER

[1 Bro. C. C. 454; W. & T. L. C.],

and has ever since been the rule, that in the administration of the estates of deceased persons, the general personal estate is the primary fund for the payment of their debts. In order to avoid this primary liability, it is necessary that the personal estate should be exempted, either by express words or by the indication of a manifest intention to the contrary.

Exemption:
express,
implied.

Exemption by express words is so plain a matter as to need no exposition or illustration. But the question as to what amounts to a manifest indication of intention to exempt the personalty is one which has caused such difficulty to

judges as to have elicited frequent expressions of the wish that nothing but express words had been permitted to alter the course and order of law.

It must be always remembered that the burden of proof ^{Onus of proof.} lies on those who claim to have the personalty exonerated (*q*). Bearing this in mind, we shall first state what is not considered a sufficiently manifest indication of this intention; and, secondly, shall examine some cases in which the personalty was held to have been exonerated.

(1.) Neither a charge of the debts upon the land, nor a direction to sell it for the payment of debts, nor the creation of a term for that purpose, nor even a devise upon the condition of the devisee's paying the testator's debts, will exempt the personalty from its primary liability (*r*). It is necessary not only that the realty should be charged, but that the testator should indicate a purpose that the personalty should not be applied (*s*). Again, the mere charge of funeral or testamentary expenses, or both together with the debts upon the real estate, will not of itself exempt the personalty (*t*), though it may afford a strong argument in that direction (*u*). ^{What does not exempt personalty. Charge of debts, &c.}

An express charge on the personalty of some particular debts, such as simple contract debts or legacies, for the payment of which it would without such charge be primarily liable, will not, by the application of the maxim, *Expressio unius est exclusio alterius*, raise a sufficient presumption that it was intended to be only an auxiliary fund for the payment of other liabilities not expressly charged upon it, but charged upon the land (*x*). ^{Express charge of some debt on personalty.}

A bequest of all the personal estate, with or without specific description, will not, at least where the legatee is ^{Bequest of personalty.}

(*q*) *Whieldon v. Spode*, 15 Beav. 145.

(*r*) *Tower v. Rous*, 18 Ves. 132, 138; *White v. W.*, 2 Vern. 43;

Inchiquin v. French, 1 Cox, 1; *Bridgman v. Dove*, 3 Atk. 201.

(*s*) *Quennell v. Turner*, 13 Beav. 240; *Samwell v. Wake*, 1 Bro. C. C.

(*t*) *Brydges v. Phillips*, 6 Ves. 570; *Booth v. Blundell*, 1 Mer. 229.

(*u*) *Tower v. Rous*, 18 Ves. 132, 139.

(*x*) *Watson v. Brickwood*, 9 Ves. 447.

also appointed executor, be so distinguished from a general residuary bequest as to exonerate the personalty passing under such bequest, although lands are devised in trust to pay all the testator's debts (*y*). It has also been so decided where the legatee was not executor (*z*). Such a case is stronger, however, in favour of exoneration than the former, and has, when coupled with a charge of debts and funeral and testamentary expenses upon the realty, been often considered sufficient to constitute the real estate a primary fund for their payment (*a*). It is still stronger in favour of exoneration, if with such a bequest a particular real estate has been devised upon trust for payment of debts and funeral and testamentary expenses (*b*).

Parol evidence not admissible.

Parol evidence is not admissible to show the intention of a testator to give his personal estate free from debts, nor will any inference be drawn concerning the testator's intention from a consideration of the relative amount of his personal estate and debts; and consequently no inquiry will be directed to ascertain such relative amount (*c*).

Cases of exemption.

(2.) The primary liability of the general personal estate will be displaced by the appropriation of a specific part of the personal estate to the payment of debts, coupled with a bequest of the general residue. But if there is no such residuary bequest the residue will still remain primarily liable, notwithstanding the appropriation of the specific fund (*d*). On the same principle, it must be observed that even an express exemption of the personalty will not extend to the benefit of the next of kin claiming by a lapse (*e*).

Where a testator devised his real estate to be sold, and directed the money to arise by the sale to be applied to pay mortgages and all other debts, the residue to be

(*y*) *Harewood v. Child*, stated Ca. t. Talb. 204; *Haslewood v. Pope*, 3 P. Wms. 324.

(*z*) *Collis v. Robins*, 1 De G. & Sm. 131; *Ouseley v. Anstruther*, 10 Beav. 453.

(*a*) *Greene v. G.*, 4 Madd. 148;

Driver v. Ferrand, 1 R. & M. 681; *Gilbertson v. G.*, 34 Beav. 354.

(*b*) *Powell v. Riley*, 12 Eq. 175.

(*c*) *Tait v. Northwick*, 4 Ves. 816; *Stephenson v. Heathcote*, 1 Ed. 38.

(*d*) *Bootle v. Blundell*, 1 Mer. 220.

(*e*) *Waring v. Ward*, 5 Ves. 675.

added to the personal estate, this was held to make the real estate the primary fund (*f*).

We are led, then, to the conclusion that the first fund to be resorted to for the payment of debts is the general personal estate; and that its primary liability will only be disturbed by an express declaration of such intention, or by dispositions which very clearly imply it. In the case of a mortgage debt there are other considerations involved, with a series of statutory modifications, which it is convenient to postpone for separate treatment. General conclusion.

2. After the general personalty, the next fund resorted to for the payment of debts is land devised upon express trust for their payment (*g*). As we have seen, such land is equitable assets, and, therefore, in all cases distributed amongst creditors *pari passu*. Lands devised on trust for debts.

3. Next in order stand lands descended to the heir, and not charged with debts (*h*). Since 3 & 4 Will. IV. c. 106, if there is a specific devise of lands to the heir, he is considered to take them in the character of devisee, and not by descent. His position as regards these lands is therefore the same as that of any other specific devisee (*i*). Lands descended.

4. Lands devised and personalty bequeathed charged with the payment of debts are next liable (*k*); and being equitable assets, are distributed in payment of debts *pro rata*. Moreover, if a devise of lands so charged lapses, and the heir consequently takes, this does not alter their place in the order of administration. They still rank as lands charged, and not as lands descended (*l*). Devises and bequests charged.

Lands charged with debts being equitable assets, the Court, in its favour of an equal distribution amongst creditors, has been inclined to give as wide a construction as possible

(*f*) *Webb v. Jones*, 2 Bro. C. C. 60; 1 Cox, 245.

(*g*) *Serle v. St. Eloy*, 2 P. Wms. 386; *Phillips v. Parry*, 22 Beav. 279.

(*h*) *Davies v. Topp*, 1 Bro. C. C. 524, 527.

(*i*) Sec. 6, *Biedermann v. Seymour*, 3 Beav. 368.

(*k*) *Donne v. Lewis*, 2 Bro. C. C. 259; *Barnewell v. Cawdor*, 3 Mad. 453.

(*l*) *Wood v. Ordish*, 3 Sm. & G. 125; *Stead v. Hardaker*, 15 Eq. 175.

to any passage in a will which can be considered as amounting to a charge of debts (*m*).

What
amounts
to charge.

A mere declaration that the debts shall be paid by the executors will not, indeed, amount to a charge of debts on realty, which does not come to the hands of the executors at all. But if with such a direction real estate is devised to executors, then it is considered as charged in their hands, unless from the special circumstances of the case a contrary intention is apparent (*n*). If, moreover, there is a direction in general terms that debts shall be paid, not specifying by whom, and accompanied by an expressed intention to dispose of the real estate, that effectually charges devised lands (*o*). The principle is that such a general direction indicates an intention that the debts shall at all events be paid in preference to any disposition of real or personal property (*p*).

The law, statutory and otherwise, respecting the sale and disposition of charged lands is discussed elsewhere (*q*).

General
legacies.

5. General pecuniary legacies next abate *pro rata* as far as is necessary (*r*). Annuities are equivalent to legacies, and after valuation (since the Judicature Act on the principles of bankruptcy) abate *pro rata* with them (*s*). It must be observed also that if a general legacy be given for valuable consideration, such as the relinquishment of dower, or of a debt, it is entitled to priority over all merely voluntary legacies (*t*).

Specific
legacies
and
devises.

6. Then specific legacies (*u*) and specifically devised real estate (*x*) not charged with debts are resorted to *pro rata*.

Residuary
devise
specific.

Under this head it is to be observed that a residuary devise is considered to be specific. While a residuary

(*m*) *Silk v. Prime*, 1 Bro. C. C. 139.

(*n*) *Warren v. Davies*, 2 My. & K. 49; *Bailey v. B.*, 12 Ch. D. 268.

(*o*) *Shallcross v. Finden*, 3 Ves. 738.

(*p*) *Clifford v. Lewis*, 6 Madd. 38.

(*q*) See pp. 298 *et seq.*

(*r*) *Clifton v. Burt*, 1 P. Wms. 680.

(*s*) *Ward v. Gray*, 26 Beav. 491; *Miller v. Huddleston*, 3 Mac. & G. 513.

(*t*) *Burridge v. Bradyl*, 1 P. Wms. 126; *Davies v. Bush*, 1 Yo. 341.

(*u*) *Fielding v. Preston*, 1 De G. & J. 438.

(*x*) *Mirehouse v. Scaife*, 2 My. & Cr. 695.

devise comprised only lands which the testator was possessed of at the date of his will, this could hardly be doubted. But it was less clear when by the Wills Act (*y*) a will was made, in the absence of a contrary intention being manifest, to speak as from the death, and thus to include in its operation after acquired property. After considerable conflict of opinion, it was, however, decided in *Hensman v. Fryer* (*z*) that a residuary devise was still specific; and this seems now to be well established (*a*). In *Hensman v. Fryer* it was, indeed, further held that a residuary devisee must contribute rateably with pecuniary legatees to the payment of debts. This portion of the decision could evidently only be made consistent with the previous proposition by considering pecuniary and specific legatees and specific devisees as on the same footing. But this is opposed to a multitude of high authorities; and we accordingly find that the broad principle of *Hensman v. Fryer* has in more recent cases been applied without interference with the prior liability of pecuniary legatees, residuary and other specific devisees and specific bequests being classed together next in order to pecuniary legacies (*b*).

The expressions which suffice to constitute a specific legacy are fully considered hereafter.

7. A widow's paraphernalia is liable (with the exception of her wearing apparel) to her husband's debts; and it would seem that this is its proper place in the order of administration (*c*). Her claim is doubtless superior to that of a pecuniary legatee (*d*), and upon principle she should be preferred to specific legatees or devisees, who are at the best but volunteers (*e*). At the same time there would be no reason for entitling her to rank higher than an appointee under a general power.

Para-
phernalia.

(*y*) 1 Vict. c. 26, s. 24.

(*z*) 3 Ch. 420.

(*a*) *Gibbins v. Eyden*, 7 Eq. 371;
Lancefield v. Iggulden, 10 Ch. 136.

(*b*) *Collins v. Lewis*, 8 Eq. 708;
Dugdale v. D., 14 Eq. 235; *Tom-*

kins v. Colthurst, 1 Ch. D. 626;
Farquharson v. Floyer, 3 Ch. D. 109.

(*c*) *Tipping v. T.*, 1 P. Wms. 730.

(*d*) *Ibid.*; *Boynton v. Parkhurst*,

1 Bro. C. C. 576.

(*e*) *Tynt v. T.*, 2 P. Wms. 542

Property
appointed.

8. Lastly, real or personal property over which the testator has a general power of appointment, and over which he has actually exercised that power *by will* in favour of volunteers, is applicable (f). As the creditors can only claim under the appointment, which is a voluntary act, they will have no claim unless the power is actually exercised, since equity will not interfere to aid the non-execution of a power in favour of volunteers (g). It must be observed, however, that a residuary gift will, under s. 27 of the Wills Act (h), operate as an appointment, unless a contrary intention appears. Property appointed is equitable assets, and accordingly distributable *pro rata* (i).

IV. *Payment of Mortgage Debts.*

It has been already remarked that these rules as to the order of the liability of assets for debts are in some degree varied when the question is respecting the payment of a mortgage debt; and for convenience sake this was reserved for separate consideration. The law on this head having been revolutionised by the statute known as *Locke King's Act* (k), the inquiry naturally resolves itself into two divisions—first, as to the law applicable to cases not within that Act; secondly, as to the effect of that Act and of others which have amended, or rather added to it.

1. *Before 17 & 18 Vict. c. 113.*

Where an estate is incumbered with a mortgage, either the incumbrance must have been created by the deceased person, or the estate must have been already incumbered when it came to his hands. The question by whom the mortgage debt was incurred principally determined what fund was *primâ facie* liable to its payment. It will facilitate the inquiry to consider the two cases separately.

(f) *Fleming v. Buchanan*, 3 De G. M. & G. 976; *Hawthorn v. Shedden*, 3 Sm. & G. 305.

(g) *Holms v. Coghill*, 12 Ves. 206.

(h) 1 Vict. c. 26.

(i) *Pardo v. Bingham*, 6 Eq. 485.

(k) 17 & 18 Vict. c. 113.

(1.) Where the mortgage was the debt of the deceased.

In this case the general rule was the same with respect to mortgage debts as to others; the general personalty was first to be resorted to. Whether the mortgaged estate descended to the heir or was devised, the heir in the former case and the devisee in the latter might require the personal representative to discharge the mortgage, so that the estate might be enjoyed *sine onere*. This was the *primâ facie* presumption, and in order to avoid it, it was incumbent on the personal representative to show that there was an intention on the part of the testator that the mortgaged estate should bear its own burden (*l*). Personalty primarily liable.
Presumption, how rebutted.

Of course, in case of an intestacy, there were no means at all of rebutting this presumption. Where there was a will it required strong expressions to do so. The strongest case for exoneration was naturally that in which the intention was manifested by express words. This requires no comment. It sufficed also if an intention was clearly implied; but the decisions show that the implication had to be very clear. Thus a devise of the estate for payment of debts generally, or a general charge of debts thereon, did not suffice to exonerate the personalty (*m*). Even if the devise contained the words "subject to the mortgage or incumbrance thereon," these were considered as merely descriptive, and not as showing an intention to throw the debt primarily on the mortgaged estate (*n*). A devise of the mortgaged land, however, charged with or on trust for payment of the mortgage debt, was considered sufficient to rebut the *primâ facie* rule (*o*). The same was the case where there was a devise to a person of an estate, "he paying the mortgage thereon" (*p*). It will be observed how nearly these cases come to an express declaration of intention. Where a tenant for life with an absolute power

(*l*) *Davies v. Bush*, 4 Bli. N. S. 386.

305. (*o*) *Evans v. Cockeram*, 1 Coll. 428.

(*m*) *Hancox v. Abbey*, 11 Ves. 169, (*p*) *Lockhart v. Hardy*, 9 Beav.

186. 379.

(*n*) *Serle v. St. Eloy*, 2 P. Wms.

of appointment raised money under the power and covenanted to pay it, it was held that the estate was primarily liable, the inference being that he intended that the real estate, which was not absolutely his own, should pay the debt rather than his own personalty (*q*).

(2.) Where the mortgage was not the debt of the deceased.

Mortgaged
estate
primarily
liable,

Where the mortgage was not the personal debt of the devisor or intestate, the general rule was that the mortgaged estate should itself be primarily liable to the charge; and this whether he acquired the estate already charged, or the charge was effected for some other purpose than for his benefit—for instance, to secure a portion or jointure (*r*).

unless
debt
adopted by
testator.

In order in such a case to reverse this rule, and throw the mortgage debt primarily on the personalty, it was incumbent on the heir or devisee to show that the devisor or ancestor had adopted the debt as his own (*s*). If he had, the ordinary rule applied. It was therefore a matter of great importance, and it was often a matter of great difficulty, to ascertain whether there had been an adoption of the debt. It must suffice briefly to illustrate successively what was and what was not considered to amount to an adoption of the debt.

What
amounted
to adoption
of debt.

In the following cases the debt was considered to have been adopted, so that the personalty became primarily liable:—Where the owner of property mortgaged by his ancestor added thereto mortgages of his own, united them, and made himself personally liable for the payment of the aggregate sum (*t*); where the purchaser of an equity of redemption entered into a covenant directly with the *mortgagee* to pay him the debt, and there was a new proviso for redemption on repayment (*u*); where a person bought

(*q*) *Jenkinson v. Harcourt, Kay*, 688.

(*r*) *Vandeleur v. V.*, 3 Cl. & F. 82; 9 Bli. N.S. 157; *Coventry v. C.*, 2 P. Wms. 222; 1 Str. 596.

(*s*) *Scott v. Beecher*, 5 Madd. 96.

(*t*) *Townsend v. Mostyn*, 26 Beav.

72.

(*u*) *Oxford v. Rodney*, 14 Ves. 417.

an estate, and to secure the purchase money gave a charge on the estate and covenanted to pay it (*x*).

In the following cases it was considered that there was ^{What not.} no adoption of the debt:—Where the deceased obtained a *small* further advance and gave an additional security for the whole sum due (*y*); where he entered into a covenant to pay a higher rate of interest (*z*); where he obtained an additional advance to pay off arrears of interest on the mortgage and the simple contract debts of the person from whom he took the estate (*a*); where a man bought subject to a mortgage, but had no contract or communication with the mortgagee, and showed no intention to transfer the debt from the estate to himself, beyond merely giving a necessary indemnity against the debt to the vendor (*b*). Nor was a charge of debts on his estate by an heir or devisee an adoption of the mortgage debt of the ancestor or devisor (*c*).

When a mortgaged estate came into the hands of a person who was at once the executor and residuary legatee of the mortgagor and the devisee of the mortgaged estate, upon his death, without having indicated a contrary intention, the mortgage debt was held to be a primary charge upon the real estate (*d*). The fact that the mortgage debt was not paid off when it might have been, was deemed to indicate an election to continue the mortgage as a charge on the real estate (*e*). But where under an intestacy the same person was both heir and next of kin of the mortgagor, and then himself died intestate without having administered to the estate, his personalty was held to be liable to the debt in exoneration of the mortgaged property (*f*). The distinction was that there having been no adminis-

(*x*) *Billinghurst v. Walker*, 2 Bro. C. C. 608.

(*y*) *Ancaster v. Mayer*, 1 Bro. C. C. 454.

(*z*) *Shafto v. S.*, 1 Cox, 207.

(*a*) *Tankerville v. Fawcett*, 1 Cox, 237.

(*b*) *Woods v. Huntingford*, 3 Ves.

132.

(*c*) *Lawson v. L.*, 3 Bro. P. C. Towl. ed. 424.

(*d*) *Scott v. Beecher*, *sup.*

(*e*) *Swainson v. S.*, 6 De G. M. & G. 648.

(*f*) *Bond v. England*, 2 K. & J. 44.

tration of the mortgagor's property, the personalty descended liable to the debt ; and there was no ground for presuming an election to exempt it at the expense of the realty.

2. *The effect of Locke King's Act (g).*

By this statute it is enacted that, " When any person shall, after the passing of the Act, die seised of or entitled to any estate or interest in any land or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not by his will or deed or other document have signified any other or contrary intention, the heir or devisee to whom such land or hereditaments shall descend or be devised shall not be entitled to have the mortgaged debt discharged or satisfied out of the personal estate or any other real estate of such person ; but the land or hereditaments so charged shall as between the different persons claiming through or under the deceased person be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof according to its value bearing a proportionate part of the mortgage debts charged on the whole thereof : provided always that nothing herein contained shall affect or diminish any right of the mortgagee on such lands or hereditaments to obtain full payment or satisfaction of his mortgage debt either out of the personal estate of the person so dying as aforesaid or otherwise : provided also that nothing herein contained shall affect the rights of any person claiming under or by virtue of any will, deed, or document already made or to be made before the 1st day of January, 1855 " (*h*).

(1.) It is to be observed with respect to this statute, first that it only applies to the administration of the estates of persons dying on or after the 1st of January, 1855.

(2.) Secondly, that it comprehends mortgages of free-

(*g*) 17 & 18 Vict. c. 113.

(*h*) s. 1.

17 & 18
Vict. c.
113, s. 1.

Limits of
its opera-
tion.

holds and copyholds (*i*), but not mortgages of leaseholds, these not being hereditaments (*k*). Of course it does not affect mortgages of other personalty.

(3.) It only applies to cases in which there is a definite or specific charge on a specified estate (*l*), and it was held not to apply to a vendor's lien (*m*).

(4.) It applies to equitable as well as to legal mortgages (*n*).

(5.) It applies not only as between the real and personal representatives of the deceased, but also in favour of the Crown claiming the personalty for want of next of kin (*o*).

It will be seen that the general effect of the statute is to reverse the *primâ facie* rule as to the fund primarily liable. Before, the personalty was first applied, unless an intention to exonerate it was manifest. Since, the mortgaged estate is first applied, unless a contrary or other intention is manifest. There has been much dispute as to what under the Act would suffice to manifest a contrary intention. In *Woolstencroft v. W.* (*p*) it was said by Lord Campbell that "the same rule should be observed with respect to exempting the mortgaged land from payment of the mortgage money as was before observed with respect to exempting the personal estate." That was to say "that as it was before necessary to show an intention not only to charge the realty, but also to exonerate the personalty, so under the statute it would be necessary to show the reverse intention in both respects; not only to charge the personalty, but also to exonerate the mortgaged estate." This was dissented from in *Eno v. Tatham* (*q*), where it was held that a direction to pay the debt out of another fund was sufficient to discharge the mortgaged estate. Mere general directions for the payment of debts were not

What amounts to contrary intention.

(*i*) *Piper v. P.*, 1 J. & H. 91.

(*k*) *Solomon v. S.*, 10 Jur. N. S. 331; *Hill v. Wormsley*, 4 Ch. D. 665.

(*l*) *Hepworth v. Hill*, 30 Beav. 476.

(*m*) *Hood v. Hood*, 6 W. R. 747.

(*n*) *Pembroke v. Friend*, 1 J. & H. 132.

(*o*) *Dacre v. Patrickson*, 1 Dr. & Sm. 186.

(*p*) 2 De G. F. & J.

(*q*) 11 W. R. 475; 4 Giff. 181.

considered sufficient (*r*); but where the personal estate was bequeathed upon trust to pay (*s*), or subject to the payment of debts (*t*), the mortgaged estate was held to be exonerated.

3. *The Amendment Acts (u).*

30 & 31
Vict. c. 69,
s. 1.

In order to extend the operation of Locke King's Act, and to set at rest the disputes which had arisen as to its construction, the statute 30 & 31 Vict. c. 69, was passed, enacting, first, that "In the construction of the will of any person who may die after the 31st day of December, 1867, a general direction that the debts or that all the debts of the testator shall be paid out of his personal estate shall not be deemed to be a declaration of an intention contrary to or other than the rule established by the said Act (*x*), unless such contrary or other intention shall be further declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate" (*y*). This, it will be observed, precisely adopts the dictum in *Woolstencroft v. W.* (*z*), already quoted.

s. 2.

Secondly, it extends the operation of the Act by enacting that "in this and the previous Act the word mortgage shall be deemed to extend to any lien for unpaid purchase money upon any lands or hereditaments purchased by a testator" (*a*).

Cases of
intestacy
omitted.

It was soon observed that this statute made no mention of the case of intestacy, and in such a case an heir-at-law was held entitled to have a lien for unpaid purchase-money discharged out of the personalty, so that he might take the purchased estate free from incumbrance (*b*). Leaseholds, moreover, were still under the old law.

40 & 41
Vict. c. 34.

At length, by 40 & 41 Vict. c. 34, both these defects

(*r*) *Pembroke v. Friend*, 1 J. & H. 132; *Coote v. Lowndes*, 10 Eq. 376.

(*s*) *Moore v. M.*, 1 De G. J. & S. 602.

(*t*) *Mellish v. Vallins*, 2 J. & H. 194.

(*u*) 30 & 31 Vict. c. 69; 40 & 41

Vict. c. 34.

(*x*) 17 & 18 Vict. c. 113.

(*y*) s. 1.

(*z*) 2 De G. F. & J. 347.

(*a*) s. 2.

(*b*) *Harding v. H.*, 13 Eq. 493.

were remedied. The previous statutes were made to apply to cases of testacy and intestacy alike, and to land or other hereditaments of whatever tenure.

Under the present law a direction that the personalty shall be liable before the incumbered estate must in order to be effectual unmistakably refer to or describe the mortgage debt (*c*).

V. *The Marshalling of Assets.*

1. *As between beneficiaries.*

It was remarked, when speaking of the order of the administration of assets as regards the priorities between the respective classes of beneficiaries, that whatever their claims *inter se*, these did not in the least prejudice a creditor's rights and remedies as against any portion of the assets of the deceased. But it is clear that the order of administration would be interfered with if a creditor chose to resort to the assets in an order different from that which the law prescribes as between the beneficiaries. If, for instance, the creditor sought to recover his debt by an execution against devised lands, instead of by a personal judgment against the executor, the effect, unless counteracted by some means, would be to reduce the benefit conferred upon a specific devisee, and to increase that of the residuary legatee, whereas the law of administration distinctly prefers the former to the latter.

This tendency is counteracted by the application of the principle known as marshalling. The principle, as laid down in the leading case of

Principle
of mar-
shalling.

ALDRICH v. COOPER

[8 Ves. 382 ; 2 W. & T. L. C. 80],

is that if one person has two funds to which he may resort for the satisfaction of his demands, he shall not by his

(*c*) *Nelson v. Page*, 7 Eq 25 ; *v. Smyth*, 17 Eq. 153.
Lewis v. L., 13 Eq. 219 ; *Sackville*

election disappoint another person who has only one fund. If, therefore, he chooses to resort to the only fund upon which the other has a claim, that other is allowed to stand in his place *pro tanto* against the fund to which otherwise he could not have resorted.

In the case we have put the creditor has an option of two, or it may be several different funds, out of either or any of which he may recover his debt. The beneficiaries have each only his own particular fund available to him, the heir the descended land, a specific legatee the property specifically bequeathed, and so on. To restore, then, the order of administration which the creditor's election has disturbed, the law permits any beneficiary who is disappointed by the creditor's actions to stand in the creditor's place as against any fund which is in the order of administration liable before his own.

It is not necessary, even if it be possible, to illustrate from cases all the possible forms of marshalling between beneficiaries which this broad principle would authorise. A few instances will serve as well as more.

Marshall-
ing for
parapher-
nalia.

We have seen that one of the last funds resorted to for the payment of debts in the order of administration is the paraphernalia of the widow. If the place ascribed to it in the last section be correct, it would follow that, with the exception of an appointee under a general power, the widow might marshal the assets as against all the other beneficiaries; in other words, if a creditor deprived her of her paraphernalia, she could claim to stand in his place to the extent of its value as against all the specific devisees and legatees, and *a fortiori* against others of earlier liability, such as the heir. We find instances in which she has successfully claimed to marshal against general pecuniary and even specific legatees (*d*).

For
specific
legatees

Again, specific legatees and devisees, who stand on an equal footing at the head of all the beneficiaries claiming

(*d*) *Tipping v. T.*, 1 P. Wms. 730; 576; *Tynt v. T.*, 2 P. Wms. 542; *Boynton v. Parkhurst*, 1 Bro. C. C. Snell, 289.

out of the testator's property, are entitled to marshal all the assets real or personal not specifically bequeathed or devised. If the creditor enforces a remedy at their expense, they can stand in his place as against every fund antecedently liable. The cases above cited to establish their position in the order of administration, apply equally here. As between themselves specific legatees and devisees (including, as we have shown, residuary devisees) have no right to marshal, their liabilities being equal (*e*).

Pecuniary legatees, again, may marshal against lands devised subject to debts (*f*); *à fortiori* against lands descended to the heir (*g*). For pecuniary legatees.

Similarly a devisee of lands charged with debts may marshal against lands descended (*h*), lands devised on trust for sale for payment of debts, and the general personal estate (*i*); while the heir can only marshal as against the two last named funds (*k*), and devisee of lands devised on trust for sale to pay debts only against the general personalty. For devisee of lands charged, &c.

The operation of the principle as between beneficiaries may thus be completely shown in tabular form. The beneficiary named in the left hand column may marshal against the one named opposite to him in the right hand column and all beneath that one.

It does not, indeed, seem to have been decided that an appointee can marshal against the paraphernalia, and it may be considered doubtful whether they should not be placed on an equal footing, neither having a right to call upon the other. They have been inserted here rather for the sake of completing the illustration than as an expression of opinion on a point which will so rarely arise.

(*e*) *Haslewood v. Pope*, 3 P. Wms. 324; *Emuss v. Smith*, 2 De G. & Sm. 722.

(*f*) *Rickard v. Barrett*, 3 K. & J. 289.

(*g*) *Sproule v. Prior*, 8 Sim. 189

Galton v. Hancock, 2 Atk. 424.

(*h*) *Harmood v. Oglander*, 8 Ves. 106.

(*i*) *Ibid.*

(*k*) *Hanby v. Roberts*, Amb. 128.

An appointee under a general power	may marshal against the widow's paraphernalia
the widow	against specific legatees and devisees
a specific legatee or devisee	„ a pecuniary legatee
a pecuniary legatee	„ a devisee of lands charged with debts
a devisee of lands charged	„ the heir
the heir	„ a devisee of lands devised to pay debts
a devisee of lands devised to pay debts	„ the general personalty.

Not only is the doctrine of marshalling applied as between beneficiaries when one or more of them has or have been disappointed by the election of a creditor; it is also utilised as between the beneficiaries themselves.

Marshalling as between beneficiaries themselves.

Thus if a testator charges some legacies on real estate, but not others, and the personal estate proves insufficient to pay them all, the legacies charged on the real estate will be thrown thereon in order to leave the personalty for the payment of the other legacies. Or if the privileged legatees choose to exhaust the personalty, the others may *pro tanto* stand in their place as against the real estate charged (*l*). The principle is clearly the same as in the previous case, the legatees whose legacies are charged on land having two funds at their disposal, the other legatees only one.

When not applied.

The doctrine of marshalling, however, will not be employed so as to alter the effect of the rules for the construction of legacies. Thus we shall see when classifying and describing the different species of legacies, that legacies charged on land are interpreted by the rules of common

(*l*) *Hanby v. Roberts*, Amb. 127; *Bonner v. B.*, 13 Ves. 379.

law, and accordingly they fail altogether if the legatee dies before they are actually paid, while legacies not so charged are interpreted on the principles of ecclesiastical law which considers them to vest on the death of the testator, and so to be transmissible to the legatee's representatives if he dies before payment. If, then, the legatee of a legacy charged on land dies before payment, the Court will not by means of the doctrine of marshalling throw this legacy on the personal estate so as to cause it to vest for the benefit of the legatee's representatives (*m*).

2. *Marshalling between creditors.*

Questions of marshalling formerly arose very frequently between creditors. As long as simple contract creditors had no claim upon real assets unless charged with debts, equity compelled specialty creditors, who could resort to these assets, to seek their remedy thereout, so as to leave the personal assets for the creditors by simple contract; or if the specialty creditors exhausted the personalty the simple contract creditors were suffered to stand in their place against the real assets (*n*); but only to the extent to which the personalty had been applied in payment of the specialty debts. They were not entitled to have a larger fund than they had originally (*o*). These forms of marshalling are, however, no longer necessary. Neither can any question now arise as to marshalling between secured and unsecured creditors of any class, the rules of administration being now, as we have seen, regulated by those of bankruptcy.

3. *Marshalling generally.*

It is necessary before dismissing the subject of marshalling to guard against a too comprehensive interpretation of the principle. Thus it does not apply as between creditors of different persons. If a person has a demand against A. and B. jointly and severally, a creditor of B. alone cannot compel the former creditor to apply to A.

Limits of
the prin-
ciple.

(*m*) *Prowse v. Abingdon*, 1 Atk. 482; *Pearce v. Loman*, 3 Ves. 135.

(*n*) *Sagitary v. Hyde*, 1 Vern. 455.

(*o*) *Cradock v. Piper*, 15 Sim. 301.

alone so as to leave the property of B. free for his separate debts, unless at least there is some equity between A. and B. themselves which would entitle B. himself to a remedy against A. (*p*).

Again, there must be not only two claimants from the same person, but one of them must have two funds belonging to the same person to which he can resort. Thus a legatee in a will of a tenant in tail of land could not throw judgment creditors exclusively on those lands in exoneration of the general assets (*q*).

Marshalling not applied for charities.

Again, we have elsewhere seen that the Court will not marshal assets in favour of charities. Thus if real and personal estate, including chattels real, are given on trust to sell for the payment of debts and legacies, and the residue is bequeathed to a charity, the debts and ordinary legacies will not be thrown on the proceeds of land so as to leave the pure personalty for the charity (*s*). The same rule applies in the case of a simple pecuniary legacy (*t*). But this rule does not in the least prevent the testator from himself producing the effect of marshalling by directing the payment of his charitable legacies to be made out of pure personalty (*u*), and such a direction will be carried into effect by allowing, if necessary, the charities to stand against realty in the place of creditors who have exhausted the pure personalty (*x*).

VI. *Marshalling Securities.*

Marshalling securities.

The doctrine of marshalling is not confined to the administration of assets, and though not strictly *à propos* to the present subject, this is a convenient place in which to refer to its application as between the creditors of living

(*p*) *Exp. Kendall*, 17 Ves. 520.

(*q*) *Douglas v. Cooksey*, 2 I. R. Eq. 311; see also *In re International &c. Soc.*, 2 Ch. D. 476.

(*s*) *Mogg v. Hodges*, 2 Ves. sr. 52.

(*t*) *Ridges v. Morrison*, 1 Cox, 180;

Cherry v. Mott, 1 My. & Cr. 123.

(*u*) *Robinson v. Geldard*, 3 Mac. & G. 735.

(*x*) *Att.-Gen. v. Mountmorris*, 1 Dick. 379.

persons. Upon the same principle that where one person has two funds to resort to, and another has only one, the former shall not disappoint the latter by depriving him of his only resource, it has been laid down that if a person who has two real estates mortgages both to one mortgagee, and afterwards only one estate to a second mortgagee, the Court will direct the first to take his satisfaction in the first place out of that estate which is not in mortgage to the second mortgagee, so as to leave the second estate, or as much of it as is not required to complete the satisfaction of the first, for the second mortgagee (*y*); and it is immaterial whether the second mortgagee has or has not notice of the first mortgage (*z*). So if one of the estates is subject to a portion, the person entitled to the portion may require the mortgagee to resort to the other estate, or if he does not, may stand in his place against it (*a*); and the principle has been applied even in favour of a voluntary settlement (*b*).

Securities will not, however, be marshalled to the prejudice of third parties. For instance, if there is first a mortgage of A. and B., and then a mortgage of B. only, and then another mortgage of A. and B. to a third mortgagee without notice of the second mortgage, the securities will not be marshalled against the last mortgagee (*c*). *Secus*, if he had notice at the time of his advance (*d*). Not to the prejudice of third persons.

The principle is applied also in Admiralty cases—for instance, where one person has a bond on the ship, freight, and cargo, and another only on the ship and freight, the former will be required to resort primarily to the cargo, or else the latter will be allowed to stand in his place against it (*e*).

(*y*) *Lanoy v. Athol*, 2 Atk. 446.

(*z*) *Hughes v. Williams*, 3 Mac. & G. 690; *Tidd v. Lister*, 10 Ha. 157; 3 De G. M. & G. 857.

(*a*) *Rancliffe v. Parkyns*, 6 Dow. 216.

(*b*) *Hales v. Cox*, 32 Beav. 118.

(*c*) *Barnes v. Rucster*, 1 Y. & C. Ch. 401.

(*d*) *Re Mower's Trust*, 8 Eq. 110.

(*e*) *The Trident*, 1 W. Rob. 29; *The Arab*, 5 Jur. N. S. 417.

SECTION II.—MATTERS RELATIVE TO ADMINISTRATION.

I. *Legacies.*1. *Specific Legacies.*(1.) *Effect of Wills' Act (1 Vict. 26).*(2.) *What constitutes a Specific Legacy.*(3.) *Generally.*(4.) *Ademption.*2. *Demonstrative Legacies.*3. *Time of Payment and Interest.*II. *Donationes Mortis Causâ.*1. *Conditions of.*2. *Place in Administration.*I. *Legacies.*

Under the head of Administration of Assets, it was necessary to classify the different species of beneficial interests which might be bestowed by a testator. From this classification, we are led to a further inquiry respecting the different modes in which legacies may be bestowed, in order to ascertain the particular characteristics of the several species. Questions of this nature continually arise on the construction of wills for the purposes of administration, and it is therefore advisable to review the consequences of the leading distinctions between the various forms of legacies, notwithstanding that it is a matter which would strictly come under the head of conveyancing rather than that of equitable jurisprudence.

Legacies
classified,
defined,

Legacies are either general, demonstrative, or specific.

A general legacy is one which does not relate to any individual thing, or sum of money, as distinct from other things of the same kind or other monies: for instance, a bequest of "a horse," of one thousand pounds, or one thousand pounds stock. Such legacies are referred to in

the Wills' Act (*f*) as "bequests of personal property described in a general manner."

A demonstrative legacy is one in which together with words of general description, such as would create a general legacy, are used additional words pointing out a particular fund out of which it is to be satisfied: for instance, a bequest of "one thousand pounds out of my East India Stock."

A specific legacy is a bequest of a particular thing or sum of money as distinguished from all others of its kind—for instance, a bequest of "my horse Dobbin," "the five hundred pounds contained in my safe," or "the debt owing to me by B."

These distinctions are of great importance. As we have ^{and compared.} seen, in the administration of assets the order of the application of a legacy depends upon whether it is considered to be general or specific; so that upon the construction put upon it in this respect, the question as to whether the legatee shall enjoy it or not may wholly rest. In this instance the position of a specific legatee is more advantageous than that of a person whose legacy is general. But in another respect the contrary is the case. Thus if after a testator has given a specific legacy, the thing specifically given ceases to exist, or ceases to belong to the testator, the legacy is considered to be adeemed; the legatee entirely loses the benefit of it, and cannot claim compensation out of the general estate. We shall presently inquire more precisely what will suffice to effect an ademption. A general legacy, on the contrary, is not liable to ademption. It is payable out of any and every part of the assets not required for payment of debts, and not specifically disposed of.

1. *Specific legacies.*

(1.) Before proceeding to consider in detail the different ^{Before the Wills' Act.} kinds of legacies, it is necessary to point out that the character of specific legacies has to some extent been modified by the Wills' Act (*g*). Previously to that enact-

(*f*) s. 27.

(*g*) 1 Vict. c. 26.

Effect of
the Act.

ment, a will was deemed to speak as far as concerned the property to which it related as from the time at which it was made. When, therefore, a testator made use of such an expression as "my stock," or "my horses at B.," there could be little doubt as to what his words referred to, and such legacies were then always considered as specific (*h*). But by section 24 of the above statute every will is to be construed "with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator." Now, therefore, when the same expressions are used, in order to treat them as specific we must consider the testator's intention to have referred to a future state of things. On the ground that this was not an admissible supposition, it was held by some judges that some stronger indication than the mere use of a personal pronoun was required under the new law to impress the legacy with a specific character (*i*). On the contrary, however, it has been pointed out that previous to the Wills' Act, it was open to a testator to make his legacy act specifically as from his death by means of such an expression as "all the furniture which I shall be possessed of at my death," and that the effect of the Act has been to import such a clause into all wills. It has been held by high authority that there is nothing unreasonable in this, and it may be considered as established that the same words will suffice now as did formerly, to effect a specific legacy (*k*). It is true that these decisions confer upon the term specific legacy a somewhat broader meaning than it formerly had. Formerly a legacy was, in the absence of express words postponing its application until the time of death, only specific when it necessarily operated, if at all, upon some definite and certain object, and it was liable to be adeemed by any alienation of that object, or any substitution of another for it, subsequent to the date of the will. Now

(*h*) *Kirby v. Potter*, 4 Ves. 748.

(*i*) *Goodlad v. Burnett*, 1 K. & J.

341.

(*k*) *Langdale v. Briggs*, 8 De G.

M. & G. 391; *Bothamley v. Sherson*,
20 Eq. 304.

the general rule is the other way. Unless there is some indication of intention that the legacy shall apply only to an object belonging to the testator at the time of the will, the legacy becomes, in fact, rather generic than specific. When it comes to be carried into effect, it may happen to apply to some object which was not at all within the contemplation of the testator at the time that he made his will, but which was subsequently acquired by him, either in addition to or in substitution for objects of the same *genus* which he had at the time of the will. Though such a legacy may, of course, fail owing to there being no property answering to it at the time of the death, it is not liable to ademption in the same manner in which specific legacies formerly were, since from the time at which it is applied, there can be no dealing with the property which will affect it. The cases cited, however, show that this alteration of the character of the legacies does not prevent legacies which were formerly considered specific from being still treated as such.

But there is a distinction to be observed between such generic legacies and a legacy which was manifestly intended to refer to a distinct and particular object. If a testator uses such words as "my stock," or "my shares," or "my horses at B.," he may well be supposed to have meant such stock, shares, or horses as he should be possessed of at his death. But if he bequeaths a distinct object, such as his "horse Dobbin," or his "shares in the A. Company," his intention clearly refers not to a *genus*, but to a certain particular thing; and, if after making such a bequest, he parts with that thing, the mere fact that before his death he acquires another of the same kind which happens to be called by the same name will not prevent the legacy from being adeemed by the alienation. In such a case there is considered to be a sufficient indication of contrary intention to prevent section 24 of the Wills' Act from saving the legacy (*l*).

(*l*) *Re Gibson*, 2 Eq. 669.

(2.) *What constitutes a specific legacy.*

In considering what expressions are considered to give rise to a specific legacy, it will be convenient to distinguish between the different classes of objects which may be comprised in a specific bequest.

Articles of
value.

Specific legacies of valuable articles (in which money is not here included) require but little exposition. There can be rarely any question about a clause which bequeaths a horse, or a piece of furniture, or jewellery definitely to a given person. Such a bequest may evidently be for life only or absolutely. It will, however, be construed as absolute, unless expressly limited to a life interest. In the case of things *quæ usu consumuntur*, the nature of the gift generally prevents a gift over from following a life interest, and even if it be expressed to be for life, or for a limited period, it will be construed as absolute (*m*). When such articles constitute the testator's stock in trade, the case is different; here there is no inconsistency in directing successive interests, and such a direction will be carried into effect (*n*). The distinction must also be observed between a specific and a residuary bequest of such things. In the latter case, if there are successive interests, they will be protected by a sale of the articles and payment of the interest of the proceeds to the persons successively entitled (*o*). It has, moreover, been held that where the same clause includes a bequest of particular articles, and a gift of the residue, the whole clause will be considered as residuary, and not as specific. Thus a gift of "all my horses and other personal estate" is deemed residuary (*p*); and so, also, where the particular expression came last; *e.g.*, a gift of "all my personal property together with all my furniture, &c." (*q*).

Money.

A bequest of a sum of money in a certain bag (*r*), or

(*m*) *Randall v. Russell*, 3 Mer. 195.

(*n*) *Phillips v. Beal*, 32 Beav. 25.

(*o*) *Howe v. Ld. Dartmouth*, 7 Ves. 137, *sup.*, p. 103.

(*p*) *Fielding v. Preston*, 1 De G. & J. 438.

(*q*) *Fairer v. Park*, 3 Ch. D. 309.

(*r*) *Lawson v. Stitch*, 1 Atk. 508.

in the hands of a certain person (*s*), is specific. A bequest even of "all my monies" has been so considered (*t*). But a bequest of a sum of money followed by a direction as to its application, *e. g.*, "to purchase a ring," or "an annuity," or "government securities," is general (*u*); as is also a bequest of money "to be paid in cash" (*x*).

A debt due to the testator may be specifically be- Debts.
queathed; and this may be effected either by a description of the sum owing; *e. g.*, a bequest of "the money due on A.'s bond" (*y*), or "the money now owing to me from A." (*z*), or by a specific gift of the security itself, as of "my note of £500" (*a*). And the bequest may be specifically made for life only, as well as absolutely (*b*). In the case, again, of a bequest of part of a debt to one person, and the "remainder," or "residue" to another, both legacies are specific (*c*).

A bequest of stock, or government securities described Stock.
as "my stock," or "my securities" is specific, or (since the Wills' Act), perhaps, more strictly speaking, generic in character, but specific in effect (*d*). A legacy, also, of so much, "part of my stock," has been considered as specific (*e*). A bequest of a sum of money out of stock is, on the contrary, demonstrative (*f*). If a legacy is expressed in general terms to be of so much stock, &c., instead of as so much money, it will not be deemed specific merely because the testator happens to have stock, &c., of a corresponding description, since his intention might have been that his executor should pur-

(*s*) *Hinton v. Priske*, 1 P. Wms. 540.

(*t*) *Manning v. Purcell*, 2 Sm. & G. 284; 7 De G. M. & G. 55.

(*u*) *Apreece v. A.*, 1 V. & B. 364; *Hume v. Edwards*, 3 Atk. 693; *Gibbons v. Hills*, 1 Dick. 324.

(*x*) *Richards v. R.*, 9 Pri. 226.

(*y*) *Davies v. Morgan*, 1 Beav. 405.

(*z*) *Ellis v. Walker*, Amb. 309.

(*a*) *Drinkwater v. Falconer*, 2 Ves. sr. 623.

(*b*) *Ashburner v. Macquire*, 2 Bro. C. C. 108.

(*c*) *Ford v. Fleming*, 2 P. Wms. 469.

(*d*) *Barton v. Cooke*, 5 Ves. 461; *Bothamley v. Sherson*, 20 Eq. 304.

(*e*) *Kirby v. Potter*, 4 Ves. 750.

(*f*) *Ibid.*, *Deane v. Teste*, 6 Ves. 146, 152.

chase such stocks out of his general personalty (*g*); but where there was a bequest of named stock in general terms, and coupled with it a direction for a sale of it, and the testator possessed some of the stock named, it was held that a specific bequest must have been intended (*h*).

Chattels
real.

A bequest of a lease, or of a rent out of a term of years is specific (*i*). On the contrary, a gift not of an annual, but of a gross sum, payable out of a term, or out of real estate, is demonstrative (*k*). And, again, this must be distinguished from a mere direction to pay a legacy out of a particular fund or estate; in this case the fund or land alone is liable (*l*). There may, also, be a specific gift of the proceeds of sale of land, whether freehold or leasehold (*m*).

(3.) *General characteristics.*

Specific
legacy
carries
everything
incident to
it,
benefits

A gift of a specific legacy carries with it everything incident to the subject-matter of the gift; such, for instance as bonuses declared after the testator's death upon shares specifically bequeathed (*n*). Bonuses declared in his lifetime, but payable after his death, do not, however, go to the legatee (*o*). Dividends, also, declared after his death, are considered as income and go to the legatee, notwithstanding that they may have been earned in the testator's lifetime (*p*).

and
liabilities.

Conversely, liabilities attaching to the subject-matter of the gift, if arising after the testator's death, are payable by the specific legatee (*q*). But payments necessary to complete the testator's interest in the subject-matter of the gift must be distinguished from such liabilities. Such

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|---|--|
| (<i>g</i>) <i>Partridge v. P.</i> , ca. t. Talb. 226; <i>Purse v. Snaplin</i> , 1 Atk. 415. | 463; <i>Walker v. Laxton</i> , 1 Y. & J. 557. |
| (<i>h</i>) <i>Ashton v. A.</i> , 3 P. Wms. 384. | (<i>n</i>) <i>Maclaren v. Stainton</i> , 3 De G. F. & J. 202. |
| (<i>i</i>) <i>Long v. Short</i> , 1 P. Wms. 403. | (<i>o</i>) <i>Lock v. Venables</i> , 27 Beav. 598; <i>De Gendre v. Kent</i> , 4 Eq. 283. |
| (<i>k</i>) <i>Savile v. Blacket</i> , 1 P. Wms. 778. | (<i>p</i>) <i>Bates v. Mackinley</i> , 31 Beav. 280. |
| (<i>l</i>) <i>Sparrow v. Gilpin</i> , 9 Ves. 483. | (<i>q</i>) <i>Adams v. Fearick</i> , 26 Beav. 384. |
| (<i>m</i>) <i>Page v. Leapingwell</i> , 18 Ves. | |

payments are payable out of the general personal estate (*r*).

Sometimes a legacy which at first sight appears to be residuary or general, may be shown to be really specific. Legacies apparently general. An instance of this is where a testator devises land upon trust to sell for a certain sum, and after giving legacies thereout, bequeaths the remainder of the money to another legatee. In this case, a total definite sum being named, the remainder is just as specific as any of the specified parts which are first mentioned (*s*). It is otherwise if the trust for sale is general, no definite sum being named. Then, if certain sums are first given and the residue afterwards bequeathed, the certain sums are specific and the residue general (*t*). The distinction between the two classes of cases is, however, often very fine (*u*).

When there is an apparently specific bequest, parol evidence is admissible to show what property there is answering to the description of it (*x*); and generally to determine whether a legacy is general or specific (*y*).

(4.) *Ademption of specific legacies.*

In speaking of the ademption of specific legacies it is necessary to distinguish between this matter and the ademption of general legacies to children, &c., by portions or subsequent gifts given in satisfaction thereof during the testator's lifetime. The term ademption is indeed applied in both cases; but that there is a marked distinction between the two is sufficiently obvious. In the latter sense many general legacies are liable to ademption, and the principle rests on the presumed intention of the testator (*z*). In the case of the ademption of specific legacies, on the contrary, the intention or *animus adimendi* is immaterial (*a*).

(*r*) *Armstrong v. Burnet*, 20 Beav. 424.

(*s*) *Page v. Leapingwell*, *sup.*

(*t*) *Read v. Strangeways*, 14 Beav. 139.

(*u*) See *Petre v. P.*, 14 Beav. 197 ;

Re Jeffery's Tr., 2 Eq. 68.

(*x*) *Horwood v. Griffith*, 4 De G. M. & G.

(*y*) *Att-G. v. Grote*, 2 R. & M. 690.

(*z*) See *Exp. Pye*, 18 Ves. 140.

(*a*) *Stanley v. Potter*, 2 Cox, 182.

Two uses of the word "ademption."

Non-
existence
of subject
matter.

The most conclusive form of the ademption of a specific legacy is where the thing expressed to be specifically bequeathed ceases to be in existence before the testator's death; if, for instance a house specifically bequeathed has been destroyed by fire, or a policy of assurance has been suffered to lapse (*b*). In the former case, notwithstanding that the house may have been insured, the specific bequest will not operate upon the insurance money, which will fall into the residuary estate (*c*). Similarly if a debt is specifically bequeathed, and is afterwards received by the testator in his lifetime, the bequest is adeemed (*d*), and this notwithstanding that the money when received is again laid out in a similar manner, as for instance, when a mortgage debt is paid off, and the money again invested on mortgage (*e*). And it makes no difference whether the debt is paid voluntarily or compulsorily (*f*).

Removal
of subject
matter.

Ademption may, moreover, be occasioned by less conclusive changes in the property than these. Thus a specific legacy of goods described as being in a particular place, will be adeemed by their removal to another place (*g*), unless the removal is only temporary or accidental, as for instance for purposes of repair, or by reason of a fire (*h*). Removal is of no effect unless the words of the bequest have evident reference to a given locality (*i*).

Change of
form.

Again, where stock which has been specifically bequeathed has been subsequently sold out by the testator, the bequest is thereby adeemed (*k*), and this will be the case even if the money realised is again laid out in similar stock (*l*). A mere change in the name or form of the stock, for instance by a parliamentary conversion, will not,

(*b*) *Stanley v. Potter*, 2 Cox, 182.

(*c*) *Durham v. Friend*, 5 De G. & Sm. 343.

(*d*) *Rider v. Wager*, 2 P. Wms. 329; *Barker v. Rayner*, 5 Madd. 208; 2 Russ, 122.

(*e*) *Gardner v. Hatton*, 6 Sim. 93.

(*f*) *Ashburner v. Macguire*, 2 Bro. C. C. 108; *Stanley v. Potter*, *sup*.

(*g*) *Green v. Symonds*, 1 Bro. C. C. 129, n.

(*h*) *Brooke v. Warwick*, 2 De G. & Sm. 425; *Chapman v. Hart*, 1 Ves. sr. 271; *Rawlinson v. R.*, 3 Ch. D. 302.

(*i*) *Norris v. N.*, 2 Coll. 719.

(*k*) *Lee v. L.*, 27 L. J. Ch. 824.

(*l*) *In re Gibson*, 2 Eq. 669.

however, cause an ademption (*m*), nor will a transfer thereof from trustees to the testator (*n*).

Ademption, moreover, will not be effected by any dealing with the stock unknown to the testator or without his authority (*o*). So if he becomes insane, the dealings of others with his property will not as a rule be suffered to affect bequests which he may have made (*p*). But a sale of personalty by order of the Court in Lunacy without any reservation of the rights of legatees, has been held to effect an ademption of a specific bequest (*q*).

In considering all questions concerning ademption the provisions of the Wills' Act already quoted must be remembered. In the instances here given the intention of the testator to refer only to the property as it existed at the time of the will, was sufficiently clear to prevent the operation of the Act. When no such intention is expressed or can be gathered from the circumstances of the case, the will will, as we have seen, speak as from the death, and then no ademption can take place.

2. *Demonstrative legacies.*

A demonstrative legacy so far resembles a specific legacy Charac-
teristics. that it will not abate with the general legacies until the fund out of which it is payable is exhausted; it so far resembles a general legacy that it will not be liable to ademption by the alienation or non-existence of the property indicated for its payment. It is considered that the primary object is the gift of the legacy, the indication of the particular fund being a matter subsidiary or directory, and not of the essence of the gift (*r*). The testator may, nevertheless, show such an intention that a legacy shall be paid out of one fund only, as to effectually make its payment conditional upon the existence of that fund (*s*).

(*m*) *Partridge v. P.*, ca. t. Talb. 226.

(*n*) *Dingwell v. Askew*, 1 Cox, 427.

(*o*) *Shaftesbury v. S.*, 2 Vern. 747, 748, n. 2; *Basan v. Brandon*, 8 Sim. 171.

(*p*) *Taylor v. T.*, 10 Ha. 475.

(*q*) *Jones v. Green*, 5 Eq. 555.

(*r*) *Savile v. Blackett*, 1 P. Wms. 777; *Vickers v. Pound*, 6 H. L. 885.

(*s*) *Coard v. Holderness*, 22 Beav. 391.

Legacies
only
apparently
demon-
strative.

Attention must be called to some cases in which a legacy apparently demonstrative is in effect specific. A bequest of money out of stock, as of "£1000 out of my Three per Cents." is demonstrative; but, as we have seen, a bequest of "£1000 stock, part of my Three per Cent. stock" is deemed to be specific (*t*), and similarly a bequest of one article or more out of a number of the same kind is specific, and gives the legatee a right to select (*u*).

3. *Time of payment of legacies, and interest.*

There are also important distinctions between the different kinds of legacies as regards the time at which they are payable, from which time interest runs thereon.

Specific
legacies.

Specific legacies are payable and interest runs thereon from the death of the testator, from which time also, as we have seen, dividends accrue to the legatee (*x*). The case of a specific bequest of a reversionary interest is evidently an exception, there being no claim then until the reversion falls into possession.

General
legacies.

General legacies, on the contrary, are not, unless the testator expressly fixes a time for their payment, payable until the expiration of twelve months after his decease, and accordingly as a rule they only carry interest from that time (*y*). But the testator may by expressed intention accelerate or postpone their payment (*z*), and in these cases interest is payable from the directed time of payment (*a*).

Excep-
tional
cases.

There are some exceptions to this rule. Thus where a legacy is given in satisfaction for a debt, it is payable at and carries interest from the death (*b*). And where a parent, or person *in loco parentis*, bestows a legacy upon an infant, the Court will generally give interest from the death by way of maintenance (*c*). But where a separate

(*t*) *Kirby v. Potter*, 4 Ves. 748.

(*u*) *Richards v. R.*, 9 Pri. 219;

Jacques v. Chambers, 2 Coll. 435.

(*x*) *Barrington v. Tristram*, 6 Ves.

345; *Bristow v. B.*, 5 Beav. 289.

(*y*) *Child v. Elsworth*, 2 De G. M.

& G. 679; *Wood v. Penoyre*, 13 Ves.

333.

(*z*) *Re Tinkler's Estate*, 20 Eq. 456;

Lord v. L., 2 Ch. 782.

(*a*) *Londesborough v. Somerville*,
19 Beav. 295.

(*b*) *Clark v. Sewell*, 3 Atk. 99.

(*c*) *Beckford v. Tobin*, 1 Ves. sr.
310; *Wilson v. Maddison*, 2 Y. & C.
Ch. 372.

fund for maintenance is provided the case is taken out of the exception, and falls within the general rule (*d*), and so where the child is adult (*e*). A legacy charged upon real property is also payable at the testator's death, and from that time interest runs (*f*); but not so where real property is devised upon trust for conversion and payment of legacies out of the proceeds; in this case the general rule applies (*g*). The distinction seems to be based on the general principle elsewhere observed (p. 514), that whereas purely personal legacies follow the rules of civil law, as expounded by the ecclesiastical courts, legacies charged on land are treated according to the doctrines of the common law.

A demonstrative legacy, as regards the time of payment and the accrual of interest, resembles a general and not a specific legacy (*h*). Demonstrative legacies.

The rate of interest usually charged is four per cent. (*i*), and compound interest will not be paid unless directed by the will (*k*), or there is a breach of trust by the executor (*l*). Rate of interest.

II. *Donationes Mortis Causâ.*

English equity has derived from the Roman law a mode of disposition intermediate in character between a specific legacy and a gift *inter vivos*, namely the *donatio mortis causâ*, and in doing so it has in the main also adopted the principles by which these gifts were regulated by Roman law. The purpose of a definition of the *donatio mortis causâ* is best served by stating the necessary conditions of such a gift. In doing so we shall indicate its character fully, by pointing out in what respects it resembles, and in what it differs from a legacy on the one hand, and a gift *inter vivos* on the other. Definition.

(*d*) *Re Rouse's Estate*, 9 Ha. 649.

(*e*) *Raven v. Waite*, 1 Swanst. 553.

(*f*) *Maxwell v. Wettenhull*, 2 P. Wms. 26.

(*g*) *Turner v. Buck*, 18 Eq. 301.

(*h*) *Mullins v. Smith*, 1 Dr. & S.

210.

(*i*) *Wood v. Briant*, 2 Atk. 523.

(*k*) *Arnold v. A.*, 2 My. & K. 365.

(*l*) *Raphael v. Boehm*, 11 Ves. 92 ;
13 *ib.* 590.

1. *Conditions of donatio mortis causâ.*

Must be
made in
view of
death.

(1.) As in Roman law so in English, a *donatio mortis causâ* is only valid when made in near contemplation of death (*m*). It is not, it seems, necessary for the donor absolutely to express the gift to be made in close expectation of death; this may be presumed from the circumstances of the case, if the donor is evidently and to his own knowledge near death (*n*).

This condition is evidently implied in the name itself, and it distinguishes the *donatio mortis causâ* from both a legacy and a gift *inter vivos*.

Must be
complete
only at
death.

(2.) The gift must be conditioned to take complete effect only after the donor's death (*o*); but in this case, as before, the condition need not be expressly declared. If the gift is made in evident contemplation of death the law will imply an intention that it is to be absolute only in the event of death (*p*).

Contrast
in Roman
law.

There were two modes of *donatio mortis causâ* recognised at Rome; in one, the subject of the gift was given on condition that it should become the property of the donee in the event of the donor's death; in the other, the subject of the gift became at once the property of the donee, but on condition that he should return it to the donor in the event of his recovery. English equity recognises only the former of these modes, a gift under a suspensive condition. Such a gift is in this respect analogous to a legacy, being revocable during the donor's life, and is accordingly contrasted with a *donatio inter vivos*.

Delivery
necessary.

(3.) The gift must be completed by a delivery of the subject-matter thereof (*q*). But in the application of this rule, it must be observed that a clear constructive delivery is deemed tantamount to actual delivery. Thus delivery to an agent of the donee or to some one on his behalf will

(*m*) Inst. II., 7. 1; *Duffield v. Elwes*, 1 Bl. N. S. 530; *Edwards v. Jones*, 1 My. & Cr. 233.

(*n*) *Miller v. M.*, 3 P. Wms. 356; *Lawson v. L.*, 1 P. Wms. 441.

(*o*) *Edwards v. Jones*, *sup.*

(*p*) *Gardner v. Parker*, 3 Madd. 184.

(*q*) *Tate v. Hilbert*, 2 Ves. jr. 120; 4 Bro. C. C. 286.

suffice (*r*). So also will a delivery by an agent of the donor at the donor's request; but not a delivery by the donor to his own agent(s). Again a delivery by symbol is equivalent to an actual delivery; thus, for instance, the delivery of the key of a box with intent to give the contents is equivalent to a delivery of its contents (*t*); but such a delivery must be distinguished from that of the delivery of a key to a person for some other purpose, as to a housekeeper, for the purpose of safe custody (*u*). The case of negotiable instruments, which are in some sense symbols of choses in action, rests on a different principle, which will be presently considered.

In this respect a *donatio mortis causa* is contrasted both with a legacy and with a gift *inter vivos*, which may be effected by deed without delivery. A peculiar effect of this condition, acting in connection with the equally essential condition that the gift is to take effect absolutely only in case of death, has been to render some kinds of property seemingly incapable of being the subject of a *donatio mortis causa*. A chose in action may, indeed, be generally effectually given by the delivery of the means of its enforcement; thus a bond (*v*), a mortgage deed (*x*), a promissory note payable to order though not indorsed (*y*), and other similar instruments (*z*), may be transferred by *donatio mortis causa*. But it has been considered that a donor's cheque cannot be validly so given, a cheque being nothing more than an order for the delivery of a certain sum of money, which order is revoked by the death of the drawer. The argument would be that a cheque is not itself a delivery of the money; and that from its nature it cannot be made conditional on death (*a*). On similar reasoning

Property
incapable
of being
given
*mortis
causa*.

Cheque,
&c.

(*r*) *Moore v. Darton*, 4 De G. & Sm. 517.

(*s*) *Farquharson v. Cave*, 2 Coll. 356, 367.

(*t*) *Jones v. Selby*, Prec. Ch. 300.

(*u*) *Trimmer v. Danby*, 25 L. J. Ch. 424.

(*v*) *Snelgrove v. Bailey*, 2 Atk. 214.

(*x*) *Duffield v. Elives*, 1 Bli. N. S. 497.

(*y*) *Veal v. V.*, 27 Beav. 303.

(*z*) *Moore v. Darton*, *sup.*; *Amis v. Witt*, 33 Beav. 619.

(*a*) *Tate v. Hilbert*, *sup.*; *Hewitt v. Kaye*, 6 Eq. 198; *Re Beak's Estate*, 13 Eq. 489.

it has been held that a delivery of receipts for annuities (*b*), or of railway scrip (*c*), will not effect a *donatio mortis causa*.

Where a cheque given is in fact actually negotiated before the death, the gift has been held to be complete and effectual (*d*), but in that case it would seem that the feature of revocability which is essential to *donationes mortis causa* is wanting, and that, therefore, if such a gift is sustainable at all it must be rather as a transaction *inter vivos* than as one of the class we are now considering.

Trust
created.

A *donatio mortis causa* may not only be given absolutely, but may be made subject to a trust for a third person (*e*), or coupled with a trust for some particular purpose, or charged with a condition (*f*).

Imperfect
donationes
mortis
causa.

(4.) When speaking of voluntary gifts *inter vivos* (*g*), it was pointed out that it was open to a donor to confer a benefit either by a direct transfer of his property, or by the creation of a trust in favour of the intended beneficiary, and it was seen that an imperfect attempt to effect a direct gift would not be assisted by considering it as a declaration of trust. A similar principle applies to *donationes mortis causa*. The donor may if he chooses bequeath his property by a testamentary instrument, or he may in most cases bestow it by a *donatio mortis causa*. If he chooses to adopt the former method the law imposes on him certain conditions, compliance with which is necessary to the validity of the bequest. Thus there must be a written instrument duly witnessed and in all respects conformable to the Wills' Act (*h*). If, on the contrary, he elects to make a *donatio mortis causa*, the Wills' Act indeed will not affect him (*i*), but he must comply with the conditions above laid down; particularly, he must deliver the property to the donee or to some one for him. But as in the

(*b*) *Ward v. Turner*, 2 Ves. sr. 431.

(*c*) *Moore v. M.*, 18 Eq. 474.

(*d*) *Rolls v. Pearce*, 5 Ch. D. 730.

(*e*) *Drury v. Smith*, 1 P. Wms. 405.

(*f*) *Blount v. Barrow*, 4 Bro. C. C.

71; *Hills v. H.*, 8 M. & W. 401.

(*g*) *Sup.* p. 51.

(*h*) 1 Vict. c. 26.

(*i*) *Moore v. Darton*, 4 De G. & S.

519.

case of a gift *inter vivos* so in this case, his attempts to bestow his property will be futile unless they amount to one or other of these alternatives. An attempt to make a *donatio mortis causa* which is defective from there being no delivery of the property, will not be suffered to take effect as a will. However clear the intention may be, and whether expressed by parol or in writing, unless it complies with the Wills' Act so as in fact to be an actual testamentary instrument, it will not be enforced (*k*). On the other hand, if the donor clearly intends to make a testamentary gift, but omits the necessary formalities, his intention will not be carried into effect by treating his attempt as a *donatio mortis causa*, even though there may have been an actual delivery (*l*).

It has, indeed, been sought to aid a donee by setting up an instrument as a declaration of trust, which is clearly void for informality as a will (*m*). But it seems clear both on principle and on authority, that such an attempt should not succeed. A written instrument expressing an intention to confer a direct gift on another, is quite a distinct thing from an instrument expressing an intention to become a trustee for another. The two intentions are not by any means the same, nor are they so closely allied that where the former is expressed the latter may be implied. We have seen this decidedly established as regards an instrument purporting to confer a benefit *inter vivos* (*n*), and it is difficult to see how the principle can be otherwise in the case of *donatio mortis causa*. The same reasoning has in fact been applied in the latter instance, and approved by high authority (*o*).

Again, the same principle prevents an ineffectual attempt to make a gift *inter vivos* from being supported as a valid *donatio mortis causa*. The two things are quite distinct,

(*k*) *Rigden v. Vallier*, 2 Ves. sr. 258; *Tate v. Hilbert*, 2 Ves. jr. 120.

(*l*) *Mitchell v. Smith*, 12 W. R. 941.

(*m*) *Morgan v. Malleeson*, 10 Eq.

475.

(*n*) *Sup.* p. 51; *Milroy v. Lord*, 4 De G. F. & J. 264.

(*o*) *Warriner v. W.*, 16 Eq. 340; *Richards v. Delbridge*, 18 Eq. 11.

and an intention to do the former by no means implies an intention in the alternative to do the latter. On the contrary, it has been laid down that the former intention is quite inconsistent with the latter (*p*).

2. *Place in administration.*

How far
resembling
a legacy.

For the purposes of administration a *donatio mortis causa* is treated in some respects as a legacy. It is true that, being given to vest absolutely in the donee at the death of the donor, the donee's title does not, like that of a legatee, require the assent of the executor or administrator. Nevertheless, it seems that on a deficiency of assets, the subject of the gift is liable like a legacy to the debts of the deceased (*q*). If this be so, it is clear that it can only be reached by the authority of the Court, which would, we submit, be exercised only in favour of creditors, so that in the order of administration the subject of a *donatio mortis causa* would be the last of the assets resorted to. It is, however, by statute, subject to legacy duty (*r*).

(*p*) *Edwards v. Jones*, 1 My. & Cr. 406, cited.
226.

(*r*) 8 & 9 Vict. c. 76.

(*q*) *Smith v. Casen*, 1 P. Wms.

CHAPTER III.

PARTNERSHIP.

*Grounds of Jurisdiction.*I. *Equity as affecting the nature and formation of Partnership.*

COX v. HICKMAN.

II. *Equity as affecting the Partnership Property.*III. *Equity as affecting the Rights of Partners inter se.*IV. *Equity as affecting the relation of Partners to Third Persons.*V. *Equity as affecting the Dissolution of Partnership.*

It is evident that in no class of cases are the facilities afforded by Courts of equity for taking accounts more serviceable than in those respecting partnerships. Nor was their superiority to Courts of law in this respect the only element in establishing and confirming their jurisdiction in these matters. The Chancery procedure for procuring discovery, the powers of granting injunctions and of decreeing specific performance, adds to the fitness of its Courts for dealing with disputes arising between partners, the nature of which is often such as to be beyond the reach of any adequate remedy under the procedure formerly known to the Courts of common law. It is not surprising, therefore, that with the development of commercial pursuits, the High Court of Chancery acquired an almost exclusive jurisdiction in partnership cases; nor that when that Court was replaced by the Chancery Division of the High Court of Justice, the dissolution of partnerships and the taking

Grounds
of jurisdiction.

of partnership accounts should prominently appear in the business especially assigned to that division (r).

In dealing in a work of the scope of the present with so wide a subject as partnership, the necessity is evident of confining our consideration as closely as possible to those questions which are peculiarly equitable. By far the greater part of the considerations arising out of the contract of partnership are common to law and equity, and it would therefore be inappropriate to discuss them here. It suffices to call attention to matters to which the distinctive doctrines or remedies of equity are applicable. These may thus be classified:—

I. Equity as affecting the nature and formation of the partnership:

II. Equity as affecting the partnership property:

III. Equity as affecting the relation of the partners *inter se*:

IV. Equity as affecting the relation of the partners to third persons, and particularly creditors:

V. Equity as affecting the dissolution of the partnership.

I. *The nature and formation of a Partnership.*

Definition.

1. Partnership in its widest sense has been defined as “the relation which subsists between persons who have agreed to share the profits of a business carried on by all or any of them on behalf of all of them” (s).

Partnerships distinguished from companies.

But this definition gives a more comprehensive meaning to the word than that which it usually bears in English law. It includes public companies as well as partnerships in the ordinary sense, and the distinction between public companies and private partnerships is so great that they cannot be conveniently treated together. It must be therefore observed that private partnerships for general business purposes may not consist of more than twenty persons;

(r) Jud. Act, 1873, s. 34.

(s) Pollock's Dig. p. 1.

and for the business of banking of not more than ten persons. A partnership exceeding these numbers is only legal when it is either—

(1.) Registered as a company under the Companies Act, 1862; or

(2.) Formed in pursuance of some other Act of Parliament or of letters patent; or is

(3.) A company engaged in working mines within and subject to the Jurisdiction of the Stannaries (*t*).

Partnerships coming under one or other of these distinctions we shall hereafter designate companies. The law respecting them is especially determined by certain statutes, to which the student should carefully refer (*u*).

2. Confining ourselves then to the consideration of partnerships in the restricted and more familiar sense of the word, some further elucidation is needed of the definition above quoted, since many important and subtle questions have arisen respecting the precise character or extent of the sharing of profits which is required to constitute the relation of legal partnership.

Essential
of partner-
ship.

A leading authority on questions of this kind is the case of

COX v. HICKMAN.

[8 H. L. 268.]

In that case Benjamin and Josiah Smith carried on business under the name of Smith & Son. Becoming embarrassed they executed a deed by which they assigned their property to trustees, and empowered them to carry on the business under the name of the Stanton Iron Company, and to divide the net income amongst the creditors in rateable proportions, with power for the majority of the creditors, assembled at a meeting, to make rules for conducting the business or to put an end to it altogether; and after the debts had been discharged the property was to be retransferred by the trustees to Smith & Son.

It was sought to make the creditors liable for debts

(*t*) 25 & 26 Vict. c. 89, s. 4.

(*u*) *Ibid.*; 30 & 31 Vict. c. 47,

c. 131; 32 & 33 Vict. c. 114; 42 & 43
Vict. c. 76; 43 Vict. c. 19.

incurred in the management of the business on the ground that their participation in the profits constituted them partners therein. But it was held that no partnership was created by the deed (*v*).

The principle that a mere sharing of the profits or receipt of a payment varying with the profits of a business is not of itself sufficient to constitute the relationship of partnership therein, which was strongly established in this case, was shortly afterwards further amplified and defined by an Act of Parliament commonly known as Bovill's Act (*x*).

28 & 29
 Vict. c. 86.

It was thereby enacted that—

“The advance of money by way of loan to a person engaged or about to engage in any trade or undertaking upon a contract in writing with such person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not of itself constitute the lender a partner with the person or persons carrying on such trade or undertaking or render him responsible as such” (*y*).

“No contract for the remuneration of a servant or agent of any person engaged in any trade or undertaking by a share of the profits of such trade or undertaking shall of itself render such servant or agent responsible as a partner therein nor give him the rights of a partner” (*z*).

“No person being the widow or child of the deceased partner of a trader and receiving by way of annuity a portion of the profits made by such trader in his business shall by reason only of such receipt be deemed to be a partner of or to be subject to any liabilities incurred by such trader” (*a*).

“No person receiving by way of annuity or otherwise a portion of the profits of any business in consideration of the sale by him of the goodwill of such business shall by

(*v*) See also *Mollwo March & Co.* (*y*) s. 1.
v. Court of Wards, 4 L. R. P. C. (*z*) s. 2.
 419. (*a*) s. 3.

(*x*) 28 & 29 Vict. c. 86.

reason only of such receipt be deemed to be a partner of or be subject to the liabilities of the person carrying on such business" (b).

"In the event of any such trader as aforesaid being adjudged a bankrupt or taking the benefit of any Act for the relief of insolvent debtors or entering into an arrangement to pay his creditors less than 20s. in the pound, or dying in insolvent circumstances, the lender of any such loan as aforesaid shall not be entitled to recover any portion of his principal or of the profits or interest payable in respect of such loan, nor shall any such vendor of a goodwill as aforesaid be entitled to recover any such profits as aforesaid until the claims of the other creditors of the said trader for valuable consideration in money or money's worth have been satisfied" (c).

This Act again has given rise to considerable discussion. In *Pooley v. Driver* (d), a person lent money to a firm under a contract that the loan should be repaid at the termination of the partnership, and that during the partnership and continuance of the loan the firm should account to the lender for the profits and pay him a definite share thereof. It was also provided that in the event of the lender's bankruptcy the firm might pay off the loan and determine the agreement, that there should be a settlement of accounts at the end of the partnership, and payment of the loan and an agreed share of profits out of the assets, subject to the lender's repayment of any sum overpaid to him on account of profits; and the agreement expressly purported to be for an advance by way of loan under the provisions of the last-named statute. The firm having become bankrupt, it was held that the lender was liable for its debts, the transaction being merely a pretence of a loan, and in fact amounting to a partnership. A similar transaction was similarly regarded in *Exp. Delhuisse* (e).

On the contrary, where a father became security for his

(b) s. 4.

(c) s. 5.

(d) 5 Ch. D. 458.

(e) 7 Ch. D. 511.

son for £10,000 on the latter's becoming a member of Lloyd's, and the son covenanted with the father that S. and no other person should underwrite at Lloyd's in the name of the son; that S. should be paid £200 a year and one-fifth of the profits of underwriting; that the father should be at liberty to withdraw the whole of his security on notice being given to the son and other necessary parties, and that immediately after such notice S. should cease to underwrite for the son or in his name; and that one half the net profits of underwriting deducting the share of S. should together with a sum of £25 per annum be considered as owing and paid to the father by the son: it was held that there was no partnership between the father and the son, but merely the relation of debtor and creditor (*f*).

Intention
of parties
is true
test.

The result of the cases and true test of a partnership amounts to this, that the real intention of the parties must be ascertained by a consideration of the facts of each particular case, and that that intention determines the nature of the relationship between them. On the one hand a sharing of profits does not alone constitute a partnership. On the other hand, if it appears that a partnership in effect was contemplated by the parties, its natural consequences cannot be evaded by procuring an advance of capital under the outward and pretended form of a loan (*g*).

Specific
perform-
ance, when
decreed.

3. As regards the formation of a partnership, it is elsewhere remarked that Courts of equity will not usually interfere to decree specific performance of an agreement to that effect (*h*). Only when the agreement specifies a definite term, and has been partly performed, can this relief be successfully sought (*i*).

Married
women
partners.

4. The only other matter of equity calling for notice in this connexion arises from the equitable doctrine as to the separate estate of married women. At law, a married

(*f*) *Exp. Tennant*, 6 Ch. D. 303.

(*g*) See also *Syers v. S.*, 1 App. C. 174.

(*h*) p. 588.

(*i*) *England v. Curling*, 8 Beav. 129; *Hercy v. Birch*, 9 Ves. 357.

woman cannot enter into a binding contract, and is therefore incapacitated from being a partner. If she purports to become such, it is her husband, and not herself, who becomes legally liable (*k*). But in equity a married woman having separate estate may, as we have seen, bind that estate by her contracts, and to that extent, therefore, she may, it seems, be treated as a partner in equity (*l*).

II. *Equity as affecting the Partnership Property.*

1. "The partners in any firm are owners in common of all property and valuable interests originally brought into the partnership stock, or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business" (*n*).

Ownership
by
partners

"The share of a partner is his proportion of the partnership assets after they have been all realised and converted into money, and all the debts and liabilities have been paid and discharged" (*n*).

Share of a
partner.

Where the property of the partnership comprises real estate, especial attention is required to the doctrines of equity as affecting it and its devolution.

Doctrines
as to real
estate.

Land may become partnership property either by being brought in at the formation of the firm by one or more of the partners, or by being purchased out of the partnership funds, or by being devised to the firm. It was formerly very material to inquire in which of these ways the land in question came to be a partnership asset; but more recent cases have to a great extent broken down the distinctions between them.

In the first place, it must be understood that *modus et conventio vincunt legem*. It is quite open to the partners by the articles of partnership, or any other agreement between them, to determine, as between themselves, the

(*k*) *Burlinson's case*, 3 De G. M. & G. 18.

G. F. & J. 533.

(*l*) Lindley, 4th edit., p. 84;
Luard's case, 6 Jur. N. S. 5; 1 De

(*m*) Pollock's Dig. Ptship. p. 53.

(*n*) Lindley, 661.

mode of disposition of the partnership property. Our inquiry only relates to cases in which this has not been done.

Lands brought in at formation of firm.

(1.) If land belongs to the partners separately before the commencement of the partnership, or, if even it belongs to them as tenants in common, *a fortiori* if it belongs to one of them alone, then the fact that it is used for partnership purposes will not make it partnership property (o).

Lands purchased with partnership funds.

(2.) If lands are purchased with partnership funds, it was in some early cases held that in the absence of express agreement, the partners occupied as joint tenants, with a right of survivorship (p). But it has since been maintained by many high authorities that lands so acquired are to be regarded as accessory to the business of the partnership, and that the right of survivorship has no application thereto (q). And though the conveyance of real estate in these circumstances be taken in the name of one of the partners, yet, if purchased with partnership money, there will be a resulting trust in favour of the firm (r).

The question on which such cases depend, resolves itself into a question as to the purposes for which the property was bought. If for the purpose of carrying on the partnership business, or for the purpose of a speculation on account of the partnership, there will be an equitable tenancy in common and no survivorship: if for the separate use of the partners, not in connexion with the business, there will be a simple joint tenancy and survivorship, with which equity will not interfere (s).

Lands devised.

(3.) Where lands have been devised to partners, the decisions as to whether or not it is to be regarded as partnership property have been very conflicting. A dis-

(o) *Burdon v. Barkus*, 4 De G. F. & J. 42; 8 Jur. N. S. 656; *Crawshaw v. Maule*, 1 Swanst. 495, 523; *Roberts v. Eberhardt*, Kay, 159.

(p) *Jeffereys v. Small*, 1 Vern. 217.

(q) *Elliott v. Brown*, 3 Swanst.

489; *Lyster v. Dolland*, 1 Ves. jr. 421.

(r) *Smith v. S.*, 5 Ves. 193; *Clegg v. Fishwick*, 1 Mac. & G. 294.

(s) *Bank of England case*, 3 De G. F. & J. 645.

inction was drawn between devised lands and purchased lands which were similarly used by a firm, in the case of *Morris v. Barrett* (*t*), the latter being deemed partnership property, the former not so; and a similar rule as to devised property was followed in *Brown v. Oakshot* (*u*) and *Phillips v. P.* (*x*). On the contrary, lands devised were deemed accessory to the trade and as partnership property in *Jackson v. J.* (*y*) and *Crawshay v. Maule* (*z*); and by the more recent and strong case of *Waterer v. W.* (*a*), such lands seem to have been placed on the same footing as lands purchased; the question depending on whether they are "substantially involved in the business."

(4.) Where partners hold real estate for partnership purposes, the question arises, whether the real estate is not, even in the absence of any expressed intention of the partners, so absolutely converted into personalty as to be held by the surviving partners, not in trust for the heir-at-law, but for the personal representative of the deceased partner. It is clearly settled that where real estate is purchased with partnership capital, for the purposes of partnership trade, it will, in the absence of any express agreement, be considered as absolutely converted into personalty, so as to pass to the personal representatives of a deceased partner, free from dower (*b*). On the contrary, where real estate belonged to the partners at the time of their entering into partnership, or has been subsequently acquired by them out of their own private monies, or by gift, it was formerly held that conversion would not, unless by express agreement, take place, although the real estate had been used for partnership purposes in trade (*c*).

Conversion of real estate in cases of partnership when it takes place.

More recent cases, however, have proceeded upon the broader principle, that where real property has been sub-

Modern rule in favour of

(*t*) 3 Y. & J. 384.

(*u*) 24 Beav. 254.

(*x*) Lindley, 652.

(*y*) 9 Ves. 591.

(*z*) *Sup.*

(*a*) 15 Eq. 402.

(*b*) *Townsend v. Deraynes*, 1 Mont.

on Partnership, App. 97; *Fereday v. Wightwick*, 1 Russ. & M. 45.

(*c*) *Thornton v. Dixon*, 3 Bro. C. C. 199; *Phillips v. P.*, 1 My. & K. 649; *Balmain v. Shore*, 9 Ves. 500; *Cookson v. C.*, 8 Sim. 529.

conversion.

stantially involved in a business or trade, it is part of the partnership property, and therefore personal estate, and that it is immaterial how it may have been acquired by the partners, whether by descent or devise (*d*).

The question then comes to this, that, as a general rule, it is inherent in the contract of partnership and needs no special stipulation, that upon the dissolution of the partnership all the property thereof must be sold and the proceeds, after payment of all the partnership liabilities, divided among the partners according to their shares, no one partner having any right to insist on retaining his share of any one item of the property *in specie*. It follows that any real property which has become the property of the partnership becomes, by force of the partnership contract, converted into personalty; and that, not merely between the partners, but as between their representatives after their decease (*e*), and also for fiscal purposes, so that the Crown can claim legacy and probate duty in respect thereof (*f*).

Land purchased for re-sale converted.

Both principle and authority also point to the conclusion that conversion will take place, not only where real property is acquired for the purposes of partnership in trade, but also where it is acquired with the partnership funds for the purpose of a re-sale upon a speculation not coming within the usual denomination of trade (*g*).

Conversion by agreement.

Of course if the owners of real estate upon entering into partnership direct or agree that it shall be sold upon the death of one of them, it will be held to be absolutely converted into personalty and will go to the personal representative, the conversion being held to have taken place at the date of the agreement (*h*).

Dealings inconsistent with conversion.

But real estate may be so dealt with by partners as to prevent this result, by showing that conversion was not intended; as, for instance, if they procure it to be con-

(*d*) *Waterer v. W.*, 15 Eq. 402.

189.

(*e*) *Darby v. D.*, 3 Drew, 495, 503, 506.

(*g*) *Darby v. D.*, *sup.*

(*h*) *Essex v. E.*, 20 Beav. 442.

(*f*) *Foster v. Steven*, 10 Eq. 178.

veyed to them in equal undivided shares (*i*); and the result is the same, where, though purchased out of partnership capital, it is not used for the purposes of the partnership in trade (*k*). Also where real estate was purchased for the purpose of the partnership in trade, but by agreement between the partners it was to be the separate property of one of them, who took a conveyance thereof in his own name, it was held that it was not partnership property, and was liable to dower (*l*).

So, likewise, property purchased with partnership capital, for partnership purposes in trade, and therefore converted into personalty, may be reconverted by the express or implied agreement of the partners. As an instance of what amounts to an implied agreement, may be mentioned a stipulation for payment of rent by the partnership to one or some of the individual partners (*m*).

Reconversion.
sion.

III. *Equity as affecting the Rights of Partners inter se.*

1. The jurisdiction of equity respecting the mutual rights of partners was especially required to meet the ends of justice because of the great restrictions imposed by the principles of the common law on actions between partners. A firm or partnership had formerly no judicial existence at law as distinguished from the persons composing it. If then one partner had a claim against the partnership, for instance for money advanced on its account, or on the other hand, if one partner was indebted to the partnership, it would have been formally necessary that in the first case all the partners (including the plaintiff) should appear as defendants; and in the second, that all the partners (including the defendant) should appear as plaintiffs. But by the technical rules of law, the same person could not appear as both plaintiff and defendant in an action. There was, therefore, a purely

Actions
between
parties

at law,

(*i*) *Custance v. Bradshaw*, 4 Ha. 315.

Randall v. R., 7 Sim. 271.

(*l*) *Smith v. S.*, 5 Ves. 193.

(*k*) *Bell v. Phyn*, 7 Ves. 453;

(*m*) *Rowley v. Adams*, 7 Beav. 548.

in equity. formal, but none the less insuperable hindrance to the legal remedy in such cases (*n*). Equity, however, disregarding these distinctions of form, entertained such cases and decreed as justice required, demanding only that all the parties, whether as plaintiffs or defendants, should be before it (*o*). Hence its jurisdiction over an extensive class of cases involving mere money demands. It need scarcely be repeated that at present the rules of equity in this as in other respects prevail in all divisions of the High Court.

2. Many other cases, however, come within the cognizance of equity on the ground of the particular forms of relief which it is able to give. Some of these fall more appropriately under the head of dissolution, and are accordingly postponed for the present. Others might with perfect consistency be relegated to the general headings of injunction and specific performance; but the balance of convenience nevertheless seems in favour of their consideration here.

Specific
perform-
ance of
articles

Where there are articles of partnership the assistance of equity is often sought for the purpose of compelling the specific performance thereof. The general principles on which this peculiar form of relief is granted are elsewhere fully considered. It suffices here to say that questions arising on partnership articles fall entirely within those principles, the most conspicuous of which is that no such relief is given if there is an adequate remedy at law.

illustrated. The application of remedy in cases of partnership articles may best be illustrated by referring to cases in which specific performance has been decreed of agreements respecting the style or name of the partnership (*p*); of agreements not to carry on business within a certain area or limits of time (*q*); of agreements as to the custody and

(*n*) *Borill v. Hammond*, 6 B. & C. 151; *Sedgwick v. Daniell*, 2 H. & N. 319.

(*o*) *Wright v. Hunter*, 5 Ves. 792.

(*p*) *Marshall v. Colman*, 2 J. & W. 266, 289.

(*q*) *Whittaker v. Howe*, 3 Beav. 383; *Turner v. Major*, 3 Giff. 442.

inspection of the partnership books (*r*); of agreements as to the mode of valuing the share of an outgoing or a deceased partner (*s*); of agreements giving a right of pre-emption of the share of an outgoing partner (*t*); of agreements to grant an annuity to a retiring partner (*u*); and of agreements not to divulge a trade secret (*x*). As to specific performance of agreements to refer to arbitration, see p. 589.

It is observable that in many of these cases, the agreements being negative, the remedy of specific performance takes the form of an injunction.

3. In the absence of articles of partnership, the mutual rights of the partners are determined by the general principles of law, and are equally enforceable in equity by means of the remedy of injunction. Thus acts tending to the destruction of the partnership property have been so restrained (*y*); and the same remedy has been applied where a partner has been hindered in the exercise of his legal right to partake in the management of the business (*z*). And, generally, acts inconsistent with the proper duties of partners may be restrained by injunction, even though no dissolution is sought, no countenance being given to any one of the partners who seeks by improper conduct to drive others to a dissolution (*a*). Injunctions.

Similarly, and for similar reasons, an account may be decreed in equity without seeking a dissolution; not, however, a continuous account of the business operations. The Court will not so undertake the carrying on of a business, though it will in proper cases investigate its accounts up to the time of commencing the action (*b*). Account.

(*r*) *Lingen v. Simpson*, 1 S. & S. 600.

(*s*) *Morris v. Kearsley*, 2 Y. & C. Ex. 139; *Gibson v. Goldsmid*, 5 De G. M. & G. 757.

(*t*) *Homfray v. Fothergill*, 1 Eq. 567.

(*u*) *Aubin v. Holt*, 2 K. & J. 66.

(*x*) *Morison v. Moat*, 9 Ha. 241.

(*y*) *Miles v. Thomas*, 9 Sim. 606; *Marshall v. Watson*, 25 Beav. 501.

(*z*) *Anon*, 2 K. & J. 441.

(*a*) *Hall v. H.*, 12 Beav. 414; 20 *ib.* 139; 3 Mac. & G. 79; *Fairthorne v. Weston*, 3 Ha. 387.

(*b*) *Loscombe v. Russell*, 4 Sim. 8; *Fairthorne v. Weston*, *sup.*

Con-
structive
trusts
where
unfair
advantage
made.

4. A third particular in which equity exercises beneficial influence in preserving the rights of partners is by its application of the principle of constructive trusts to cases in which a partner unconsciously seeks to take advantage of his position to the prejudice of his co-partners.

Cases in illustration of this have already been given and commented on (c); and at present, therefore, mere reference will suffice to such cases as the renewal of leases and purchases of partnership property by individual partners.

IV. *Equity as affecting the relation of Partners to Third Persons.*

Actions
between
firms
having a
common
partner.

1. Recourse to equity was sometimes needed as between one partnership and another, on the same grounds as those above shown to have founded its jurisdiction in matters of account between the members of a single partnership. Thus, for the reason already given, it was formerly impossible for one firm to sue another at law if there was one partner common to both firms (d). But equity in this case, as in the other, was independent of such technical difficulties, and, having the parties before it, adjudicated upon the dealings between the firms, determining and enforcing their respective rights (e).

2. But the jurisdiction of equity as between partnerships and third persons is most conspicuous in its administration of the assets of partnerships and partners for the benefit of creditors.

Joint
liability of
partners.

(1.) Every partner is liable jointly with the other partners for all debts and obligations incurred while he is partner, and in the usual course of the partnership business by or on behalf of the firm (f).

It has been recently decided by the highest authority

(c) *Supra*, pp. 84 and 97.

(d) *Bosanquet v. Wray*, 6 Taunt.
597.

(e) *Mainwaring v. Newman*, 2 B.
& P. 120.

(f) *Pollock Dig. Ptship*. 25.

that as between living partners and creditors the liability for the debts of the partnership is joint only, and not several (*g*). If, however, a partner dies, his estate then becomes severally liable to the unsatisfied debts and obligations of the partnership, and creditors may at their option pursue their remedies against the surviving partners or partner or against the estate of the deceased partner; and it is immaterial what is the state of accounts between the partners, or what the ability of the survivors to pay (*h*).

Several liability of estate of deceased partner.

(2.) In the distribution, however, of the estates of deceased partners in Chancery, and of bankrupt and insolvent partners in bankruptcy, the partnership property is applied as joint estate in payment of the debts of the firm; and the separate property of each partner is applied in payment of his separate debts. If in either case there is a surplus, then the surplus of the joint estate is applicable for the payment of the separate debts, and the surplus of the separate estate for the payment of the partnership debts.

Administration of assets.

Thus if A. and B. are in partnership, and on A.'s death his estate is administered by the Court, both A.'s and B.'s estates being solvent, A.'s separate creditors and the creditors of the firm may prove their debts against A.'s estate, and be paid out of his assets *pari passu*. The payments thus made to creditors of the firm must then be allowed by B. in account with A.'s estate as payments made on behalf of the firm, so that in ascertaining the value of A.'s share in the partnership these payments are credited to him. If, however, A.'s estate is insolvent, and the creditors of the firm proceed to recover the full amount of their debts from the solvent partner B., B. will then become a creditor of A.'s separate estate for the amount of the partnership debts paid by B. beyond his proportion as determined by the partnership contract. If B. is also in-

Illustrated.

(*g*) *Kendall v. Hamilton*, 4 App. C. 504.

(*h*) *Baring v. Noble*, 2 R. & M. 475.

solvent, the creditors of the firm must first resort to the partnership property, and the separate creditors of the partners to the separate estates of each respectively. The partnership creditors can only resort to so much of the separate property of the partners as remains after paying the separate debts in full, and the separate creditors can only resort to so much of the partnership property as remains after paying the debts of the firm in full (*i*). It follows from this rule of administration, that a partnership creditor who is indebted to a deceased or insolvent partner cannot set off his separate debt against the partnership debt due to him (*k*).

Excep-
tional
cases.
Debts
arising
through
fraud.

Such is the general principle of the distribution of the joint and separate assets. It is, however, subject to certain exceptions. Thus if a partnership debt is contracted by the fraud of any of the partners, the creditor so defrauded may, at his option, treat it as a joint or separate debt (*l*). If there is no joint estate of a bankrupt firm, the partnership creditors may at once resort to the separate estates; but joint estate of the most trifling amount will exclude this right (*m*).

3. On the other hand, the trustee in bankruptcy of a bankrupt firm may prove against the separate estate of any partner, where that partner has fraudulently converted partnership property to his own use without the consent or ratification of the other partners (*n*).

Partner
may not
prove in
competi-
tion with
creditors.

It is to be observed further that in the administration of the joint estate of a firm, or of the separate estate of any partner, no partner or lender of money under 28 & 29 Vict. c. 86 can prove for a debt due to him from the partnership in competition with the outside creditors of the firm, or with those of any other partner. His claim only arises when

(*i*) See Pollock's Dig. Ptship. 110, 111; *Ridgway v. Clare*, 19 Beav. 111; *Lodge v. Pritchard*, 1 De G. J. & S. 610; *Exp. Dear*, 1 Ch. D. 519.

(*k*) *Stephenson v. Chiswell*, 3 Ves. 506.

(*l*) *Exp. Adamson*, 8 Ch. D. 807.

(*m*) *Exp. Kennedy*, 2 De G. M. & G. 228; *Exp. Clay*, *ib.* 230, n.

(*n*) *Exp. Harris*, 2 V. & B. 210; *Lacey v. Hill*, 4 Ch. D. 537; *Read v. Bailey*, 3 App. C. 94.

all the external debts of the firm have been paid, except in case his property has been fraudulently converted to the use of the firm (*o*).

V. *The Dissolution of Partnerships.*

1. The first consideration is by what means a dissolution of a partnership may be effected.

Generally the duration of a partnership is fixed on by the agreement of the partners. When so fixed, the agreement will not be interfered with by a Court of equity, except under special circumstances, which will be presently considered. The partnership, however, may at any time be dissolved by the common consent of all the partners (*p*). In the absence of such consent, or of the special interference of the Court, a partnership for a fixed term only expires with the efflux of the time agreed upon for its duration (*q*). Where term is fixed.

In the following cases, notwithstanding that a definite term has been expressly agreed upon, the partnership is determined by operation of law. Dissolution by operation of law.

(1.) The death of any partner dissolves the partnership, and this (in the absence of any previous agreement to the contrary) not only as to himself, but as between all the members of the firm (*r*). Death of partner.

(2.) The alienation of the share of any partner by operation of law dissolves the partnership. Thus if a partner becomes bankrupt (*s*), or outlawed (*t*), or his property is taken in execution (*u*), the partnership is dissolved. Alienation of share by law.

(3.) Unless the shares in the partnership are by agreement assignable, a partnership at will is dissolved by an assignment or incumbrance of his share by a partner (*v*). Assignment of share.
In the case of a partnership for a fixed term, it seems

(*o*) *Exp. Hayman*, 8 Ch. D. 11.

(*p*) *Hall v. H.*, 12 Beav. 414.

(*q*) *Featherstonehaugh v. Fenwick*, 17 Ves. 298.

(*r*) *Gillespie v. Hamilton*, 3 Mad. 251; *Backhouse v. Charlton*, 8 Ch. D.

444.

(*s*) *Barker v. Goodair*, 11 Ves. 83.

(*t*) *Pollock Dig.* 72.

(*u*) *Lindley*, 691.

(*v*) *Lindley*, 698.

that such an assignment or incumbrance is at least a valid ground for seeking dissolution (*x*).

Business becoming unlawful.

(4.) A partnership is dissolved by the happening of any event which makes it unlawful to carry on the business thereof. For instance, a declaration of war between England and a foreign country dissolves a partnership between an Englishman and a subject of that country (*y*).

Dissolution by decree. Grounds of. Incapacity.

(5.) A partnership may also be dissolved by decree of a Court of equity. Such a decree may be obtained under any of the following circumstances:—

i. When any partner becomes permanently incapable of performing his part of the partnership contract.

Lunacy.

In case of a partner being found lunatic by inquisition, the jurisdiction to dissolve the partnership is in the Lord Chancellor or Lords Justices (*z*). If otherwise shown to be of permanently unsound mind, the Chancery Division will so decree (*a*). Lunacy, however, does not *ipso motu* effect a dissolution. Physical incapacity is, equally with mental derangement, a ground for seeking dissolution (*b*).

Bad conduct.

ii. When a partner so conducts himself with reference to partnership matters that it becomes practically impossible for the other partners to carry on the business with him.

Conduct coming under this description may consist of active improprieties or of negligence. Breaches of trust or confidence (*c*), habitual or persistent breaches of the articles of the partnership, for instance, as to the mode of carrying on the business (*d*), and the becoming liable to a criminal prosecution (*e*), afford good grounds for seeking a decree of dissolution (*f*). So also does persistent negligence of the partnership business by a partner whose duty it is to devote his attention to it (*g*).

(*x*) Lindley, 698; *Nerot v. Bur-*
nard, 4 Russ. 247.

(*y*) *Esposito v. Bowden*, 7 E. & B.
763.

(*z*) 16 & 17 Vict. c. 70.

(*a*) *Waters v. Taylor*, 2 V. & B.
299, 303; *Jones v. Hoy*, 2 My. & K.
125; *Jones v. Lloyd*, 18 Eq. 265.

(*b*) *Whitwell v. Arthur*, 35 Beav.

140.

(*c*) *Smith v. Jeyes*, 4 Beav. 503.

(*d*) *Waters v. Taylor*, *sup.*

(*e*) *Essel v. Hayward*, 30 Beav.

158.

(*f*) See *Atwood v. Maude*, 3 Ch.

373.

(*g*) *Harrison v. Tennant*, 21 Beav.

482.

The Court will not, however, regard mere disagreements or quarrels, or incompatibility of temper between partners (*h*), unless they be of such an aggravated nature as to destroy all confidence and the possibility of advantageous working (*i*).

iii. When the business of the partnership can only be carried on at a loss, or there is no reasonable prospect of profit (*k*). Business loss.

iv. It has already been noted that the assignment or incumbrance of his share by a partner for a fixed term affords, in the absence of agreement to the contrary, a ground for seeking dissolution. Assignment of share.

v. In this place it is also appropriate to observe that if a partnership has been induced by any species of fraud or imposition, the contract may be dissolved *ab initio* at the suit of the party deceived (*l*). Partnership induced by fraud.

Unless there is a distinct breach of the partnership articles, a dissolution, if decreed, will not be made retrospective, but will operate only from the date of the judgment (*m*).

2. On the dissolution of a partnership the existing creditors of the firm of course retain all their rights against the partners which have already accrued. Rights of creditors in dissolution.

Further than this, if the firm continues its business, and no notice of the retirement of a partner is given to a creditor, and the retiring partner was known by him to have been a partner in the firm, such retiring partner remains liable as if he had continued in the firm (*n*). But if the retiring partner was unknown to the creditor as a partner, his liability entirely ceases on his retirement. As regards past customers of a firm, it appears that mere public advertisement of dissolution in the *London Gazette*

(*h*) *Wray v. Hutchinson*, 2 My. & K. 235; *Goodman v. Whitcomb*, 1 J. & W. 589. (*l*) *Rawlins v. Wickham*, 1 Giff. 355; *Hue v. Richards*, 2 Beav. 305.

(*i*) *Baxter v. West*, 1 Dr. & S. 173; (*m*) *Lyon v. Tweddle*, 17 Ch. D. 529.

Leary v. Shout, 33 Beav. 582. (*n*) *Exp. Robinson*, 3 D. & Ch. 388.

(*k*) *Jennings v. Baddeley*, 3 K. & J. 78.

is not sufficient notice to prevent the continuance of their rights; but such advertisement is sufficient notice of the fact to creditors who were not customers at the time of dissolution (o).

The estate of a partner who dies (p) or who becomes bankrupt (q) is not in any case liable to any future debts of the firm; and it is immaterial that the person giving credit thereafter is ignorant of the fact of such death or bankruptcy (r).

Where a dissolution has taken place, an account will not only be decreed, but if necessary a manager or receiver will be appointed to close the partnership business and sell the partnership property, so that a final distribution may be made of the partnership effects (s). But a manager or receiver will not be appointed except with a view to a dissolution (t).

(o) Lindley, 416.

(p) *Brice's Case*, 1 Mer. 622.

(q) Lindley, 405.

(r) *Houlton's Case*, 1 Mer. 616.

(s) Story, 672.

(t) *Hall v. H.*, 3 Mac. & G. 79.

CHAPTER IV.

PARTITION AND THE SETTLEMENT OF BOUNDARIES.

THE jurisdiction of equity with respect to both partition and the settling of boundaries originated in the insufficiency of the common law remedy. As regards partition it is true that proceedings might be taken at common law by writ of partition; but they were at a very early period found to be inadequate and incomplete. Various and complicated interests are often attached to the ownership of real estate, and when the titles were in any degree complicated, and discovery was needed to ascertain them, the processes of law were very inapt to deal with them. Moreover, Courts of law were content merely to declare the rights of the parties, and were incapable of effecting a partition by means of mutual conveyances; nor could they regulate the appropriate and indispensable compensatory adjustments. For these and other similar reasons, equity assumed a general concurrent jurisdiction with Courts of law in all cases of partition. In so doing it usually followed the analogies of the law, and decreed partition in such cases as Courts of law recognised as fit for their interference. Equity, however, did not limit its jurisdiction to cases cognisable or relievable at law; there were many cases in which it interfered where law would not have done so—for instance, where an equitable title was set up. Now, by section 34 of the Judicature Act, 1873, the jurisdiction in cases of partition, which was formerly common to Courts both of law and equity, is assigned exclusively to the Chancery Division of the High Court.

Origin of
jurisdiction.
In partition.

In settle-
ment of
bound-
aries.

With respect to the settling of boundaries, different origins have been alleged for the jurisdiction. It is undoubtedly as old as the reign of Elizabeth; but whether arising from the intent to prevent multiplicity of suits at law, or from the issuing of a commission at first by request or consent of the parties, and then on the application of one party who should succeed in establishing an equitable ground for requiring it, or whether it was founded by the chancellors upon the basis of the *actio finium regundorum* of Roman law, is disputed. But whatever its origin, the case of *Wake v. Conyers* well illustrates its present character and extent.

Compared. It resembles the remedy of partition in that the relief in both cases is effected by similar machinery—namely, the issuing of a commission with authority to inquire as to the rights of the parties, and to settle them definitively—and for this reason the two subjects have been here classed together. They differ, however, conspicuously in that whereas partition is to those parties within its scope a matter of right, the commission to settle boundaries will not be granted unless it is claimed by virtue of some equity superinduced by the act of the parties. It is eminently dependent upon the discretion of the Court.

SECTION I.—PARTITION.

- I. *Who may claim Partition.*
- II. *What is subject to Partition.*
- III. *Mode of effecting Partition.*
- IV. *The Partition Acts.*
- V. *Costs.*

I. *Who may claim Partition.*

1. At common law co-parceners only had a right to Co-
compel partition. By the Statute of Partition (*a*) joint ^{parceners,}
tenants and tenants in common of any estate of inheritance ^{joint}
in their own right, or that of their wives, might be com- ^{tenants,}
pelled to make partition between them, and by 32 Hen. 8, ^{tenants in}
c. 32, s. 1, joint tenants and tenants in common for lives ^{common.}
or years are declared compellable to make partition in the
same way.

2. A decree of partition is a matter of right, and it has ^{Tenants}
been held to be no objection to a bill that the interests of ^{for life,}
all parties would not be finally bound by it. Consequently,
a decree may be obtained either by or against a person
having only a limited interest as a tenant for life (*b*), or
a tenant for life determinable on marriage (*c*), or a ^{and for a}
tenant for a term (*d*); and where there are remainder-men ^{term.}
who may come *in esse* and be entitled, they will be bound
by a decree made against the tenant for life (*e*).

A tenant in tail may also obtain a decree for a partition ^{Tenants in}
(*f*); and a partition between tenants in tail, though by ^{tail.}
parol, binds the issue (*g*).

(*a*) 31 Hen. 8, c. 1.

(*b*) *Gaskell v. G.*, 6 Sim. 643.

(*c*) *Hobson v. Sherwood*, 4 Beav.
184.

(*d*) *Baring v. Nash*, 1 V. & B.

551.

(*e*) *Wills v. Slade*, 6 Ves. 498.

(*f*) *Brook v. Hertford*, 2 P. Wms.
518.

(*g*) *Rose v. R.*, 2 Vern. 233, cited.

Claimants
must be
entitled in
possession.

3. A person can only compel partition when entitled in possession. A bill was held not maintainable by a joint-tenant or tenant in common in reversion or remainder (*h*); nor could he, after bill filed, by acquiring possession and amending his bill, have put himself in a better position.

A suit for partition being based on the assumption that there is no litigation, it cannot be made the means of trying a legal title (*i*). Disputed questions seem, however, sometimes to have been decided in such cases with the consent of the parties (*k*).

Mort-
gagees.

4. A mortgagee of an undivided share may sue for foreclosure and partition, and move for a receiver of the rents of the undivided share of the mortgagor (*l*). A partition, however, appears not to be properly incident to a foreclosure or redemption suit in such a way that the owners of the equity of redemption can be allowed to insist on it against the will of the mortgagee, who has no interest in the question (*m*).

Plaintiff
must show
title.

5. The title of the plaintiff to an interest in the property of which he seeks partition must be shown (*n*). Where, however, there is only a small failure in the proof of title, or the interests of the parties in the property are uncertain, they may be ascertained by a reference, and under the old practice this must have been done previous to the commission issuing; for, as is laid down in *Agar v. Fairfax* (*o*), it was not the duty of the commissioners to ascertain the proportions and rights of the parties; their duty commenced when these were ascertained. Uncertainty as to the shares of the parties is, therefore, not an objection to partition, but only a ground for postponing it until such shares have been ascertained.

Dowress.

6. Upon the same principles as in cases of partition, although dower was originally a mere legal demand, a

(*h*) *Evans v. Bagshaw*, 8 Eq. 469 ;
5 Ch. 340.

(*i*) *Slade v. Barlow*, 7 Eq. 296.

(*k*) *Burt v. Hoggan*, 14 Eq. 160.

(*l*) *Fall v. Elkins*, 9 W. R. 861.

(*m*) *Watkins v. Williams*, 3 Mac
& G. 622.

(*n*) *Cartwright v. Pultney*, 3 Atk
380 ; *Jope v. Morshead*, 6 Beav. 213

(*o*) 17 Ves. 533.

widow, being a joint owner, became entitled in equity to an assignment of one-third of the lands of which her husband was seised in fee or in tail, which her issue might possibly have inherited. And since the Dower Act (*p*) the right applies as well to equitable as to legal estates.

If the widow's right to dower was disputed, an issue was formerly directed (*q*), and if necessary an inquiry made as to the lands of which she was dowable (*r*). The right being established, and the property affected thereby ascertained, the next step is to ascertain the dower; and this may be done either by a reference, or by directing a commission to issue, which is made out, executed, and returned in the same manner as a commission of partition (*s*).

II. *What is subject to Partition.*

1. Freeholds have been always subject to partition; Freeholds. but previous to 4 & 5 Vict. c. 35 (amended by 21 & 22 Vict. c. 94), the Court of Chancery, though it could decree specific performance of an agreement to divide copyholds (*t*), had no power to direct the partition of copy- Copyholds. holds or of customary freeholds. It was given, however, by the 85th section of that Act (*u*).

2. Leaseholds, also, under 32 Hen. 8, c. 32, s. 1, were Lease- holds. subject to partition during the term, at the instance of the termor of an undivided share (*x*); but partition of leaseholds was refused where the landlord might immediately obtain an injunction to restrain the parties from executing it by any act amounting to waste, or where the Court could not protect one of the tenants in common from a breach of covenant which might be committed by the other (*y*).

(*p*) 3 & 4 Will. 4, c. 105.

(*q*) *Mundy v. M.*, 2 Ves. jr. 122.

(*r*) *Meggott v. M.*, 2 Ves. jr. 127, cited; Seton, 681-3, 4th ed.

(*s*) *Goodenough v. G.*, 2 Dick. 795; *Wild v. Wells*, 1 Dick. 3; *Mundy v.*

M., *sup.*

(*t*) *Bolton v. Ward*, 4 Hare, 530.

(*u*) *Horncastle v. Charlesworth*, 11 Sim. 315.

(*x*) *Baring v. Nash*, 1 V. & B. 551.

(*y*) *North v. Guinan*, Beat. 342.

Manor
advowson.

3. A partition has been decreed of a manor (*z*) and of an advowson (*a*); in the latter case the right to present being sometimes given alternately, in others determined by lot (*b*). Under the present law, however, a sale would always be directed (*c*).

III. *Mode of effecting Partition.*

Com-
mission,
when
directed.

1. It is not the ordinary practice for a commission to issue for the purpose of making a partition. If inquiries are necessary, it can be done in Chambers; if not, in Court at the hearing. There are many cases, however, in which a commission may still be directed to issue in accordance with the old practice of the Court, especially where the interests of parties under disability are concerned; but sometimes the Court would approve of a partition without a commission even where infants were interested, upon proper evidence of value (*d*).

Difficulty
no objec-
tion.

2. The inconvenience or difficulty in making a partition has been held to be no objection to a decree (*e*). The consequences of this, previous to the Partition Acts, were often sufficiently absurd. In *Turner v. Morgan* (*f*) there was a decree for the partition of a single house. The commissioners allotted to the plaintiff the whole stack of chimneys, all the fireplaces, the only staircase, and all the conveniences in the yard. Exception was taken to this by the defendant, but Lord Eldon said he did not know how to make a better partition for them; the parties ought to agree to buy and sell. But it has never been deemed necessary that every house on an estate should be divided, if a sufficient part of the whole could be allotted to each; and in making a partition the

(*z*) *Sparrow v. Friend*, 1 Dick. 348.

(*a*) *Johnstone v. Baber*, 6 De G. M. & G. 439.

(*b*) *Ibid.*

(*c*) See *infra*; *Young v. Y.*, 13 Eq.

175, note.

(*d*) *Brassey v. Chalmers*, 4 De G. M. & G. 528.

(*e*) *Warner v. Baynes*, Amb. 589.

(*f*) 8 Ves. 143.

Court would take the convenience of the parties into consideration (*g*). If the commissioners can find nothing to guide their discretion, they may cast lots; if they cannot agree, they may make separate returns, and the Court may deal with them as it may think advisable (*h*).

3. For the sake of convenience, in equity a recompense has been made, either by a sum of money or rent for owelty, or equality of partition (*i*). This could not have been done under the writ at law. And the commissioners themselves, unless directed by a decree, have no power to award such sums to be paid; such power rests with the Court (*k*).

Recom-
pense.

In making a decree for partition, the equitable rights of all the parties interested in the estate have been adjusted; for instance, effect has been given to an equitable lien on the premises for improvements, and where one of a number of joint owners has received more than his share of the rents of the estate, the Court has directed an account (*l*).

4. A partition never affects the rights of third parties, such as commoners or mortgagees; and persons having such interests are therefore not necessary parties to the suit (*m*); and though it has been laid down that the legal title should be before the Court (*n*), this does not seem to have been insisted on; and now service of notice of a decree under s. 9 of the Partition Act, 1868 (*o*), will be sufficient to bind persons who formerly were made parties in the first instance.

Rights of
third
parties not
affected.

5. After a partition in law no conveyances were requisite, as the rights of all parties were concluded by the judgment. But in equity, when the shares have been allotted to the parties, the partition is perfected by reciprocal con-

Mutual
convey-
ances.

(*g*) *Clarendon v. Hornby*, 1 P. Wms. 446; *Canning v. C.*, 2 Drew, 436.

(*h*) *Ibid.*

(*i*) *Clarendon v. Hornby*, *sup.*

(*k*) *Mole v. Mansfield*, 15 Sim. 41.

(*l*) *Swan v. S.*, 8 Price, 518; *Story*

v. Johnson, 2 Y. & C. Ex. 586; *Lorimer v. L.*, 5 Madd. 363.

(*m*) *Swan v. S.*, *sup.*

(*n*) *Miller v. Warmingtton*, 1 J. & W. 493.

(*o*) 31 & 32 Vict. c. 40.

veyances; though in a case where the shares were minute and complicated, the Court, in order to save expense, instead of directing such conveyances, has declared each of the parties trustee as to the shares allotted to the others of them, and then vested the whole trust estate in a single new trustee under the Trustee Acts, with directions to convey to the several parties their allotted shares (*p*). Where infants were parties, the conveyances were respited until they came of age, and a day then given them to show cause against the decree; but now under the Trustee Act, 1850, ss. 7 and 30, the Court may declare the infant a trustee of the shares allotted in severalty to others (*q*).

IV. *The Partition Acts.*

Sale before
the Acts.

Before the Partition Act, 1868, the Court had jurisdiction in a suit, even where infants were interested, if it appeared for their benefit, to direct a sale instead of a partition, if it was desired by the parties *sui juris* (*r*). So a sale was directed in a case in which a married woman was interested for her separate use without power of anticipation (*s*). But if one of several tenants in common refused to sell, he could, whatever the consequences to all parties, insist upon a partition (*t*).

The powers of Courts of equity in dealing with actions for partition have, however, been largely increased and improved by the operation of the Partition Acts, 1868 and 1876, which are now to be read as one.

31 & 32
Vict. c. 40,
s. 3,

By s. 3 of the Act of 1868 (*u*), it is enacted that "In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, then, if it

(*p*) *Shepherd v. Churchill*, 25 Beav. 21.

(*q*) *Bowra v. Wright*, 4 De G. & Sm. 265.

(*r*) *Davis v. Turcey*, 32 Beav. 554.

(*s*) *Fleming v. Armstrong*, 34 Beav. 109.

(*t*) *Griffies v. G.*, 11 W. R. 943.

(*u*) 31 & 32 Vict. c. 40.

appears to the Court that by reason of the nature of the property to which the suit relates, or of the number of parties interested or presumptively interested therein, or of the absence or disability of some of those parties, or of any other circumstance, a sale of the property and distribution of the proceeds would be more beneficial for the parties interested than a division of the property between or among them, the Court may, on the request of any of the parties interested, and notwithstanding the dissent or disability of any others of them, direct a sale of the property accordingly, and may give all necessary or proper consequential directions."

2. By sect. 4: "In a suit for partition, where if this and s. 4. Act had not been passed a decree for partition might have been made, then if the party or parties interested individually or collectively to the extent of one moiety or upwards in the property to which the suit relates request the Court to direct a sale of the property and a distribution of the proceeds, instead of a division of the property between or among the parties interested, the Court shall, unless it sees good reason to the contrary, direct a sale of the property accordingly, and give all necessary or proper consequential directions."

3. The distinction between these two sections requires Compared. careful notice. The former gives power to the Court to direct a sale on the request of *any of the parties* interested, if, in the opinion of the Court, a sale would be more beneficial than a division of the property. The latter provides that if the parties interested *to the extent of a moiety or upwards* request a sale, the Court shall sell, unless it sees good reason to the contrary. Thus if the party or parties requesting a sale are interested in less than a moiety of the property, it is for them to prove to the Court the advantage of a sale; and if they succeed in this the Court may so decree. But if the party or parties praying a sale have a moiety or upwards of the interest, then the advantage of a sale is *primâ facie* presumed, and the burden of

proving that it is not advantageous is on those who oppose it (*x*).

In a case under sect. 3 the Court only regards the question as to whether a sale would or would not be "more beneficial" for the parties interested in a pecuniary view, and it will not go into questions of sentiment (*y*). If the advantage of a sale is established, the Court is not restrained from granting it by the fact that only a small proportion of the parties interested request a sale (*z*).

Under this section, also, orders for sale have been made at the request of infants (*a*) and married women (*b*).

Under sect. 4 it is imperative on the Court to order a sale, unless it sees good reason to the contrary. The mere fact that the owners of the other moiety oppose the sale is not a reason to the contrary (*c*), nor is the fact that the income of an infant defendant interested in a moiety might be materially diminished by a sale (*d*), nor that the owner of one moiety is a yearly tenant of the whole property, and occupies it for commercial purposes and resides thereon (*e*). See also *Roughton v. Gibson* (*f*). In a case in Ireland, it has indeed been laid down that the only good reason to the contrary is to show affirmatively that there is no difficulty in making an actual partition (*g*).

s. 5,

4. Sect. 5 enacts that "In a suit for partition, where if this Act had not been passed a decree for partition might have been made, then if any party interested in the property to which the suit relates requests the Court to direct a sale of the property, and a distribution of the proceeds, instead of a division of the property between or among the parties interested, the Court may, if it thinks fit, unless the

(*x*) *Drinkwater v. Ratcliffe*, 20 Eq. 530; *Pemberton v. Barnes*, 6 Ch. 685; *Rowe v. Gray*, 5 Ch. D. 263.

(*y*) *Drinkwater v. Ratcliffe*, *sup.*

(*z*) *Pemberton v. Barnes*, *sup.*; *Allen v. A.*, 21 W. R. 842.

(*a*) *Young v. Y.*, 13 Eq. 175, n.; *France v. P.*, *ibid.* 173; *Grove v. Comyn*, 18 Eq. 387.

(*b*) *Davis v. Wietlisbach*, cited, 18

Eq. 388.

(*c*) *Pemberton v. Barnes*, 6 Ch. 685, 694.

(*d*) *Rowe v. Gray*, *sup.*

(*e*) *Wilkinson v. Joberns*, 16 Eq. 14.

(*f*) 25 W. R. 269.

(*g*) *In re Langdale's Estate*, 5 I. R. E. 572.

other parties interested in the property, or some of them, undertake to purchase the share of the party requesting a sale, direct a sale of the property, and give all necessary or proper consequential directions; and in case of such undertaking being given, the Court may order a valuation of the shares of the party requesting a sale in such manner as the Court thinks fit, and may give all necessary or proper consequential directions."

And by sect. 6: "On any sale under this Act, the Court and s. 6. may, if it thinks fit, allow any of the parties interested in the property to bid at the sale on such terms as to non-payment of deposit, or as to setting off or accounting for the purchase money, or any part thereof, instead of paying the same, or as to any other matters as to the Court seem reasonable."

The construction to be put upon sect. 5 was explained Explained. by Sir G. Jessell, M.R., in *Drinkwater v. Ratcliffe (h)*, where it is pronounced to apply to a case not coming under sect. 4, inasmuch as a moiety do not apply for sale, nor under sect. 3, inasmuch as the Court is here supposed to see no reason for preferring a sale to a partition; in other words, to a case where parties representing less than a moiety apply for a sale, but do not succeed in showing that it is more beneficial than partition. In such circumstances sect. 5 confers a new power on any party to apply for a sale, and declares that he is entitled to it unless the other parties interested, or some of them, undertake to purchase the share of the party requesting a sale. In short, if one party, whatever his interest or reason, desires a sale, the parties objecting must, if the Court thinks fit, either withdraw their objections, or else be prepared to buy his share. But there is nothing to compel a man to sell his share, and it is open for a party requesting a sale, on an offer being made to purchase his interest, to withdraw his request (*i*). Sect. 5, in fact, gives an entirely new power to any party who is prepared to sell his own interest, to insist upon and

(h) *Sup.*

(i) *Williams v. Games*, 10 Ch. 204.

obtain a decree of sale, unless some one is willing to buy his share, but does not give to the Court power to compel any party interested to sell his share at a valuation; and if the party rejects the offer of a valuation, he still has his common law right to a partition, and all rights conferred by the other sections of the Act, as far as he can bring himself within them (*k*).

Conduct
of sale.

As to sect. 6, though as a general rule parties having the conduct of a sale are not allowed to bid, this has sometimes been allowed (*l*). The more proper course, however, would seem to be to give the conduct of the sale to some third person, if the parties desire liberty to bid (*m*).

ss. 7 & 8.

5. By sects. 7 and 8, sect. 30 of the Trustee Act, 1850 (*n*), is decreed to extend and apply to cases where the Court directs sale instead of partition; and sects. 23, 24 and 25 of the Settled Estates Act, 1856 (*o*), to money received on such sale: the object of the first provision being to transfer the legal estate, by giving the Court the power to make a vesting order thereof (*p*); and the object of the second, to give power to direct the purchase money to be paid to trustees, and applied by them as directed.

s. 9.

6. Sect. 9 enacts that, "Any person who if this Act had not been passed might have maintained a suit for partition, may maintain such suit against any one or more of the parties interested without serving the other or others (if any) of those parties, and it shall not be competent to any defendant in the suit to object for want of parties; and at the hearing of the cause the Court may direct such inquiries as to the nature of the property and the persons interested therein and other matters as it thinks necessary or proper, with a view to an order for partition or sale being made on further consideration; but all persons who

(*k*) See *Pitt v. Jones*, 5 App. C. 651, reversing *Gilbert v. Smith*, 8 Ch. D. 548, 11 Ch. D. 78, where the whole of the vexed question is fully considered and authoritatively decided.

(*l*) *Pennington v. Dalbiac*, 18 W. R. 684.

(*m*) *Roughton v. Gibson*, 25 W. R. 269.

(*n*) 13 & 14 Vict. c. 60.

(*o*) 19 & 20 Vict. c. 120, see now 40 & 41 Vict. c. 18, ss. 35—37.

(*p*) *Basnett v. Moxon*, 20 Eq. 182.

if this Act had not been passed would have been necessary parties to the suit shall be served with notice of the decree or order on the hearing, and after such notice shall be bound by the proceedings as if they had been originally parties to the suit, and shall be deemed parties to the suit, and all such persons may have liberty to attend the proceedings, and any such person may within a time limited by general orders apply to the Court to add to the decree or order."

Sect. 10 provides that, "In a suit for partition the Court s. 10. may make such order as it thinks just respecting costs up to the time of hearing."

Sect. 9 was designed to avoid the difficulties which had previously often arisen from the non-joinder of all parties interested in the suit. But it was found ineffectual, and in consequence its amendment formed a conspicuous feature of the Act of 1876.

7. The following doubts which had arisen under the administration of the Act of 1868 led to fresh legislation :—
Doubts arising under the Act of 1868.
 It was questioned whether a decree could be made for sale of an estate if the bill contained no prayer for partition, unless it were added by amendment (q).

To meet this, sect. 7 of 39 & 40 Vict. c. 17, enacted that
39 & 40 Vict. c. 17, s. 7.
 an action for partition should include an action for sale and distribution of the proceeds, and that it should be sufficient to claim a sale, and not necessary to claim a partition.

It having been held that a married woman could not enter into an undertaking to purchase under sect. 5 of the Act of 1868 unless her husband joined therein, it was enacted by sect. 6 of the Act of 1876 that in an action for s. 6. partition a request for sale might be made on an undertaking to purchase given on the part of a married woman or other person under any disability by the next friend or other person authorised to act on behalf of such person ; but that the Court should not be bound to comply with

any such request or undertaking on the part of an infant unless it appeared that the sale or purchase would be for his benefit.

Notwithstanding section 9 of the Act of 1868, considerable difficulty arose in cases where persons interested were out of the jurisdiction, it being held that no sale could be ordered unless every person interested in the property was either a party to the cause or had been served with notice of the decree (*p*). And where a decree for sale had been made in the absence of such parties, the Court refused to allow it to be acted upon until notice of the decree had been given them by advertisement (*q*). The Court also refused to decree a sale in the absence of a married woman whose share in the property was vested in trustees (*r*).

s. 3.

These decisions led to sect. 3 of the Act of 1876, which gave the Court discretion to dispense with service on persons whom the Act of 1868 required to be served where it was impracticable, or could not be done but at an expense disproportionate to the value of the property, directing advertisements to be published instead of such service; and provided that after the expiration of the time limited by the advertisement such persons should be bound by the proceedings in the action, and that the Court might then direct a sale.

ss. 4 & 5.

Sects. 4 & 5 made provision for the payment into Court, further disposal, and ultimate distribution of the purchase-money, in cases in which service had been thus dispensed with.

V. Costs.

The rule laid down in *Agar v. Fairfax* (*s*) was that no costs would be given until the commission—that is to say, until the hearing—but that the subsequent costs of issuing, executing, and confirming the commission should

(*p*) *Hurry v. H.*, 10 Eq. 346.

(*q*) *Peters v. Bacon*, 8 Eq. 125.

(*r*) *Dodds v. Gronow*, 20 L. T. 104.

(*s*) 17 Ves. 533.

be borne by the parties in proportion to the value of their respective interests, without any costs of the subsequent proceedings. It has been held that under the Partition Act, 1868, sect. 10, the Court is not bound by the old rule, and may now exercise its discretion (*t*). Sometimes the old rule has been followed (*u*), but the general rule now is that the entire costs should be borne by the parties in proportion to their interests as declared by the decree (*v*). This is, however, subject to the discretion of the Court under the influence of special circumstances.

(*t*) *Simpson v. Ritchie*, 16 Eq. 103. 14.

(*u*) *Wilkinson v. Joberns*, 16 Eq.

(*v*) *Cannon v. Johnson*, 11 Eq. 90.

SECTION II.—SETTLEMENT OF BOUNDARIES.

Wake v. Conyers.

- I. *Ownership of Soil must be in question.*
- II. *Proof of Defendant's possession and Plaintiff's title, and necessity of equitable relief.*
- III. *There must be special equitable ground for relief.*

We learn from the leading case of

WAKE v. CONYERS

[1 Eden, 331 ; 2 W. & T. L. C. 405]

some of the essential conditions which are required to create a jurisdiction as to the settlement of boundaries—conditions which are not rendered obsolete by the Judicature Act (x).

Soil must
be dis-
puted.

I. There must be a *bonâ fide* dispute as to the ownership of the soil itself.

Thus the Court will not issue a commission to ascertain the boundaries of a parish in order to settle a dispute as to tithes (y) or rates (z).

There being such dispute, relief has been granted where a part of the land in dispute belonged to a charity, and could not be ascertained without inquiry (a). And the jurisdiction has been held to extend to the colonies (b).

Owner of
rent
relieved.

An owner of a rent has been held entitled to equitable assistance, "on usage of payment," where in consequence of the confusion of boundaries or otherwise, the particular lands on which the rent was charged could not be fixed

(x) *Lascelles v. Butt*, 2 Ch. D. 588.

(y) *Atkins v. Hatton*, 2 Anst. 386.

(z) *St. Luke's v. St. Leonard's*, 1 Bro. C. C. 40.

(a) *Att.-Gen. v. Bowyer*, 5 Ves. 300.

(b) *Tulloch v. Hartley*, 1 Y. & C. Ch. 114.

upon (c). But the plaintiff must be able to fix upon some part of the land, and say that it is part of the land sought to be charged (d).

II. In order to claim relief, it is necessary for the plaintiff to show that some portion of the land the boundaries of which are alleged to be confused is in the possession of the defendant (e). He must also establish, by the admission of the defendant or by evidence, a clear title to some land in the defendant's possession (f). He must also show clearly that without the assistance of the Court the boundaries could not be found (g), or at least that failing the assistance of equity a multiplicity of legal actions would be occasioned (h).

Plaintiff must prove defendant's possession, and his own title.

III. The jurisdiction as to the settlement of boundaries has been very jealously limited to cases in which some equity is superinduced by the act of the parties. It is important to inquire, therefore, what acts constitute a sufficient ground for the jurisdiction.

There must be equitable ground for relief.

If the confusion has been occasioned, not by the negligence of both, but by the fraud of one of the parties, as by his ploughing or digging too near the other, with the intention of obliterating the boundaries, the Court has jurisdiction (i).

Fraud.

Where such a relation exists between two parties as that of tenant and landlord, which makes it the duty of the tenant to preserve the boundaries, if he permits them to be destroyed, so that the landlord's land cannot be distinguished from his, and specifically restored, he will be compelled, even in the absence of fraud on his part, to substitute land of equal value; and the land or its value may be ascertained by commission (k). And it seems

Confusion caused by tenant.

(c) *D. of Leeds v. Powell*, 1 Ves. sr. 171.

(d) *Mayor &c. of Basingstoke v. Bolton*, 3 Drew, 50, 63.

(e) *Att.-Gen. v. Stephens*, 6 De G. M. & G. 111, 149.

(f) *Godfrey v. Littell*, 1 Russ. & My. 59; 2 ib. 630.

(g) *Miller v. Warmington*, 1 J. & W. 491.

(h) *Bouverie v. Prentice*, 1 Bro. C. C. 200.

(i) *Bute v. Glamorgan Canal Co.*, 1 Ph. 681.

(k) *Att.-Gen. v. Fullerton*, 2 V. & B. 264; *Brown v. Wales*, 15 Eq. 142.

that the same result would follow if the confusion was occasioned by a tenant for life (*l*). Where a confusion of lands was occasioned by a deviser, and they came into the hands of parties whose duty it was to ascertain the boundaries, a person entitled to part of such lands was allowed to come into equity to establish his claim (*m*).

Relief will be granted not only against a party guilty of such neglect or fraud, but also against all claiming under him, either as volunteers or purchasers with notice (*n*).

(*l*) *Att.-Gen. v. Stephens*, 6 De G. 701.
M. & G. 133.

(*n*) *Att.-Gen. v. Stephens, sup.*

(*m*) *Hicks v. Hastings*, 3 K. & J.

CHAPTER V.

SPECIFIC PERFORMANCE.

SECTION I.—PRINCIPLES OF THE JURISDICTION.

- I. *Generally.*
- II. *Grounds for refusing relief.*
 1. *From the nature of the contract.*
 2. *From the conduct of the plaintiff.*
- III. *Statutory modifications of the Jurisdiction.*

I. The remedy for a breach of contract at common law is personal only; the sole redress which it affords to a disappointed party is damages. Consequently, as far as the common law remedy is concerned, it is open to a contracting party either to perform the contract or to pay damages, and to choose between these two courses at his pleasure. Equity, on the other hand, has regarded such a remedy as in many cases inadequate; and deeming a contracting party bound in conscience to do exactly what he has agreed to do, has exercised its authority to compel the specific performance of such agreements.

But it is not in every case that equity will thus interfere. The ground of its jurisdiction being the inadequacy of the remedy at law, it follows as a general principle that where damages at law will give a party the full compensation to which he is entitled, and will put him in a position as beneficial to him as if the agreement had been specifically performed, equity will not interfere.

General principles of the jurisdiction.

Remedy at law must be inadequate.

Equity regards the substance, not the form.

The jurisdiction is not, however, depended upon or affected by the form or character of the contract. It suffices that the transaction in substance amounts to and is intended to be a binding agreement for a specific object. Thus if a bond with a penalty is made upon condition to convey certain lands upon the payment of a certain price, it will be deemed in equity an agreement to convey the land at all events, and not to be discharged by the purchaser's election to pay the penalty, although it has assumed the form of a condition only (*a*). It suffices that the primary object of the parties is the transfer of the property, and if that requires specific performance, the penalty will be regarded only as a security for its attainment (*b*).

The jurisdiction is discretionary.

Further, the exercise of the jurisdiction of equity to grant specific performance is always discretionary. The mere fact that the legal remedy is not adequate relief for the breach of a contract is not in itself sufficient to give to a plaintiff a claim as of right to the assistance of a Court of equity. The Court will always look at all the facts of the case, and will direct or refuse its action accordingly; and it may well be that something in the circumstances of the case, or in the position or conduct of the parties, will prevent the granting of the relief where the nature of the agreement would seem to afford good ground for seeking it.

General grounds of refusing specific performance.

II. Before proceeding, therefore, to particularly examine the operation of the doctrine of specific performance, it will be convenient to inquire what are the circumstances which will, on general grounds, induce equity to refuse its assistance. These circumstances relate either to the nature of the contract or to the conduct of the parties.

1. *From the nature of the contract.*

Agreement must be legal.

(1.) The agreement must be a legal one.

There is clearly no jurisdiction in equity to enforce an agreement which the law will not recognise at all. It is,

(*a*) *French v. Maccalle*, 2 Dr. & W. 269, 274; *sup.* p. 212. (*b*) *Story*, 715.

as we shall see, often a ground for equitable relief that there is no remedy at law owing to the neglect of some formal provision, such as the writing or signature of a party, while nevertheless the circumstances are such as to render it inequitable for the party to avail himself of such a defence, and thus to refuse performance. But it is obvious that the neglect of such a legal provision cannot make a contract any better than it would have been if that provision had been complied with. Thus, though the Court will in some cases enforce parol arrangements in the nature of a trust, it cannot do so when the trust or understanding is designed to compass what is illegal—as, for instance, to hold land for the purposes of a charity in evasion of the Mortmain Act (*c*). Nor will it enforce an agreement which would result in the commission of a fraud, or which calls upon a man to do what he is not competent to do (*d*), still less an immoral agreement. Where a contract has been divisible, part being legal and part illegal, the legal part has been enforced (*e*). Similarly, specific performance has been refused when to enforce it would be to compel the defendant to commit a breach of a prior agreement with another person (*f*), and where performance would give rise to a fraud on the public (*g*).

(2.) On the same principle, an agreement without consideration cannot be enforced—as, for instance, where a person by voluntary settlement covenants to convey lands, and afterwards refuses to do so, or disposes of the lands otherwise by his will (*h*). Here, again, none of the circumstances which constitute a claim upon equity for assistance can make the agreement any stronger than it would have been at law.

(3.) There must be a completed agreement, and the Complete

(c) 9 Geo. 2, c. 36; *Stickland v. Aldridge*, 9 Ves. 516.

(d) *Harnett v. Yeilding*, 2 S. & L. 549.

(e) *Odessa &c. Co. v. Mendel*, 8 Ch. D. 235.

(f) *Willmott v. Barber*, 15 Ch. D. 96.

(g) *Post v. Marsh*, 16 Ch. D. 395.

(h) *Jefferys v. J.*, Cr. & Ph. 138 141; *Price v. Jenkins*, 4 Ch. D. 483.

On good consideration.

and not
ambiguous.

terms of it must be certain and unambiguous (*i*). But in some cases where the evidence was in some respects contradictory, the Court has decreed performance, at the same time directing inquiries to ascertain the precise terms about which the parties differed (*k*); and it is not necessary to prove terms which are immaterial—*e.g.*, an agreement to do an act which has been already done, or which would be enforceable apart from such stipulation (*l*).

Reason-
able, and
not pre-
judicial to
third
persons.

(4.) Equity will not interfere to assist a contract which is unreasonable or prejudicial to third parties interested in the property (*m*), and though mere inadequacy of consideration is not of itself a sufficient ground for refusing specific performance (*n*), equity has refused to enforce where to do so would work great hardship on the defendant (*o*), or would cause a forfeiture (*p*); but in general if hardship is made a ground of defence, it ought to be proved that it existed at the date of the contract (*q*).

Not pro-
ductive of
future
litigation.

(5.) A contract will not be enforced when future litigation is likely to result from its performance—for instance, forcing a doubtful title upon a purchaser (*r*), or where there are other conflicting claims likely to harass the purchaser (*s*).

Possible of
perform-
ance.

(6.) Nor will specific performance be decreed of a contract which it is impossible to perform, or the material terms of which the Court has it not in its power to enforce (*t*).

The
plaintiff

2. *As to the conduct of the parties.*

(1.) It is a general rule of equity that a plaintiff must

(*i*) *Swaissland v. Dearsley*, 29 Beav. 430; *Tatham v. Platt*, 9 Ha. 660; *Taylor v. Portington*, 7 De G. M. & G. 328.

(*k*) *Mortimer v. Orchard*, 2 Ves. jr. 243; *Chattock v. Muller*, 8 Ch. D. 177.

(*l*) *Gregory v. Mighell*, 18 Ves. 328.

(*m*) *Thomas v. Dering*, 1 Keen, 729; *Beeston v. Stutely*, 6 W. R. 206.

(*n*) *Haywood v. Cope*, 25 Beav. 140; *Sullivan v. Jacob*, 1 Moll. 477.

(*o*) *Wedgwood v. Adams*, 6 Beav.

600; 8 Beav. 103; *Watson v. Mars-
ton*, 4 De G. M. & G. 230.

(*p*) *Peacock v. Penson*, 11 Beav. 355.

(*q*) *Webb v. L. & P. R. Co.*, 9 Ha. 129.

(*r*) *Rogers v. Waterhouse*, 4 Drew, 329; *Parkin v. Thorold*, 16 Beav. 59, 67.

(*s*) *Pegler v. White*, 33 Beav. 403.

(*t*) *Green v. Smith*, 1 Atk. 572, 573; *Waring v. M. S. & L. R. Co.*, 7 Ha. 483, 492.

come with clean hands. The Court will never countenance fraud. If, therefore, a plaintiff has been guilty of any wilful misrepresentation, or fraudulent suppression of the truth, he will get no relief (*u*). And if he has obtained the agreement by misrepresentation, he will not be able to get specific performance on waiving the part affected by the misrepresentation, and asking for performance *pro tanto*. Such conduct operates as a personal bar (*v*). But a mere indefinite misrepresentation, such as ought to put a person upon inquiry, will not so operate (*x*). So, also, though suppression of truth may be a bar (*y*), the mere suppression of acts having been done by the plaintiff, when the defendant must have known they were done by somebody, is not sufficient (*z*). So if the plaintiff has induced the defendant to take too much drink, and then taken advantage of him, not only would specific performance be refused, but the contract would be rescinded (*a*); and if, though the plaintiff were innocent of inducing the defendant to drink, he was so intoxicated as to be incapable of exercising sound judgment, that would alone prevent a decree for specific performance (*b*).

(2.) *Vigilantibus non dormientibus æquitas subvenit.* and promptly.

A plaintiff must come within a reasonable time with his demand. *Laches* will disentitle him to assistance (*c*). Especially is this the case when the subject-matter of the contract is an article of fluctuating value; so that delay may greatly change the aspect of the bargain (*d*).

III. It will be convenient also here to call attention to certain statutes which have affected the jurisdiction in

Statutory
modifica-
tions of

(*u*) *Drysdale v. Mace*, 5 De G. M. & G. 103; *Falcke v. Gray*, 4 Drew, 651; *Playford v. P.*, 4 Ha. 546.

(*v*) *Clermont v. Tasburgh*, 1 J. & W. 112.

(*x*) *Fenton v. Browne*, 14 Ves. 144; *Atwood v. Small*, 6 C. & F. 232.

(*y*) *Shirley v. Stratton*, 1 Bro. C. C. 440.

(*z*) *Haywood v. Cope*, *sup.*

(*a*) *Cooke v. Clayworth*, 18 Ves.

12.

(*b*) *Cragg v. Holme*, cited, 18 Ves. 14; but see *Lightfoot v. Heron*, 3 Y. & C. Ex. 586.

(*c*) *Moore v. Blake*, 1 Ball & B. 62; *Smith v. Clay*, 3 Bro. C. C. 610; *Eads v. Williams*, 4 De G. M. & G. 674, 691.

(*d*) *Pollard v. Clayton*, 4 K. & J. 462.

the jurisdiction.

these matters, particularly the Chancery Amendment Act, 21 & 22 Vict. c. 27, commonly known as Lord Cairns' Act.

Cairns' Act, 21 & 22 Vict. c. 27.

(1.) By 21 & 22 Vict. c. 27, which took effect from and after the 1st of November, 1858, it is enacted that in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same Court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the Court shall direct. It also provides means for the assessment of damages and the trial of questions of fact either by a jury before the Court itself or by the Court alone, or for the assessment of damages by a jury before any judge of one of the Superior Courts of Common Law at *nisi prius*, or before the sheriff of any county or city.

With reference to the construction and application of this Act, the following points seem to be settled:—

Effects of this Act.

(i.) That the statute does not extend the jurisdiction of the Court to cases where there is a plain common law remedy, and where before the statute it would not have interfered (*e*). In other words, the Court could not under the Act award damages save in cases where it had jurisdiction to decree specific performance. It can give damages in lieu of, or in addition to, specific performance; but this ability brings no new matter within the principle of specific performance (*f*).

(ii.) Where, however, the Court has jurisdiction to grant specific performance, it may award damages for non-performance of part of the contract, in respect of which part

(*e*) *Wicks v. Hunt*, Johns. 372, 380.

(*f*) *Rogers v. Challis*, 27 Beav. 175; *Lewers v. Shaftesbury*, 2 Eq. 270.

it could not have enforced specific performance. For example, though, as we shall see, there is no jurisdiction to decree specific performance of a contract to build a house, the remedy at law being complete, yet if a plaintiff asks for specific enforcement of an agreement whereby he undertook to grant and the defendant to take a lease as soon as the defendant should have built a new house on the land, the plaintiff may be awarded damages for the non-building of the house at the same time that he obtains a decree for specific performance of the agreement to accept a lease (*g*).

(iii.) A plaintiff will not be entitled to damages if he has done any act which would disentitle him to specific performance (*h*).

(iv.) Though, as a general rule, damages will be awarded only as incidental to granting specific performance or an injunction, yet damages may be given where the evidence is insufficient to procure a mandatory injunction (*i*).

(v.) The power to give damages being discretionary, the Court may refuse to give damages where the question of damages can be more satisfactorily tried at law (*k*).

(2.) By 25 & 26 Vict. c. 42, the Court of Chancery may, in its discretion, direct an issue to be tried at the assizes or at *nisi prius*, where the circumstances render such a course advisable. Rolt's Act,
25 & 26
Vict. c. 42.

(3.) By the Judicature Act, 1873 (*l*), s. 34, all causes and matters for the specific performance of contracts between vendors and purchasers of real estates, including contracts for leases, are assigned to the Chancery Division of the High Court of Justice. Judicature
Act, 1873.

Another division of the High Court may, in a proper case,

(*g*) *Soames v. Edge, Johns.* 669.

Tenant, 9 Ch. 212.

(*h*) *Collins v. Stuteley*, 7 W. R. 710.

(*k*) *Durell v. Pritchard*, 1 Ch. 244.

(*i*) *City of London Brewery v.*

(*l*) 36 & 37 Vict. c. 66.

transfer a cause in which a question of specific performance arises to the Chancery Division (*m*).

Having regard to these preliminary matters, we proceed to consider the general operation of the doctrine of specific performance, illustrated by the leading decisions on the subject.

(*m*) *Hilman v. Mayhew*, 1 Ex. D. 132.

SECTION II.—TO WHAT CONTRACTS THE REMEDY IS
APPLIED.

I. *Contracts relating to Land.*

II. *Contracts relating to Personal Chattels.*

Cuddee v. Rutter.

1. *General rule.*

2. *Special circumstances giving Jurisdiction.*

Pusey v. Pusey.

Somerset v. Cookson.

III. *Contracts respecting Personal Acts.*

I. *Contracts relating to Land.*

1. It has been said that where a contract in writing respecting real property, in conformity with the Statute of Frauds, is entered into between competent parties, and is, moreover, in its nature and circumstances unobjectionable, it is as much, of course, for a Court of equity to decree specific performance, as it is for a Court of common law to give damages for the breach of such a contract (o), and the fact that the lands in question are situate out of the jurisdiction is no bar to the remedy (p).

2. We elsewhere fully discuss the action of the Courts of equity in those cases in which the Statute of Frauds has not been complied with, but in which it is nevertheless deemed equitable to assist the plaintiff; and under this head it therefore now only remains to call attention to certain special circumstances under which the jurisdiction has been appealed to.

3. Considerable discussion has taken place respecting contracts by railway companies to take lands under the statutory powers conferred upon them, and it is settled

General rule in favour of specific performance.

Defence of Statute of Frauds, *infra*, p. 591.

Contracts to take lands under

(o) *Hall v. Warren*, 9 Ves. 605, 608.

(p) *Penn v. Baltimore*, *sup.* p. 11.

statutory powers.

that such companies are equally with private individuals amenable to the enforcement of specific performance at the suit of the vendor. This has been put upon the basis of mutuality of remedy: the Company being able to compel the transfer, the vendor has on his side a right to insist on the specific performance of the contract (q).

Effect of notice to treat.

Where also a railway company has given notice to treat for land, and the price has been fixed by the landowner and the Company, or by arbitrators under the Lands Clauses Consolidation Act, the railway company is treated as an ordinary purchaser, and will be compelled in equity to complete the purchase (r). So also, if after notice to treat the company has paid the purchase money for leaseholds, and has with the consent of the lessee been admitted into possession, it will at the suit of the lessee be compelled to accept an assignment with the usual covenants (s).

When a railway company has given notice to treat for a portion of a piece of land, and the landowner has in reply given notice to the company to take the whole, it is open for the company then to withdraw from the notice to treat, and this even after action brought by the landowner for a declaration made in accordance with his notice, and notwithstanding that the company has previous to the action brought given notice of intention to apply for the appointment of a surveyor to ascertain the value of the whole of the land (t). If, however, the declaration prayed for has been made, specific performance will be decreed (u).

Agreements for leases and mortgages.

4. Agreements to grant leases or mortgages in consideration of money due are frequently the grounds of suits for specific performance (x). But equity will not enforce the granting of a lease, when the lease, if granted, might be determined at once for a breach of a covenant which

(q) *Doherty v. Waterford & Limerick Railway*, 13 Ir. Eq. 538.

(r) *Harvey v. Met. R. Co.*, 7 Ch. 154.

(s) *Ibid.*

(t) *Grierson v. Cheshire Lines' Com.*, 19 Eq. 83.

(u) *Marson v. L. C. & D. R.*, 7 Eq. 546.

(x) *Hermann v. Hodges*, 16 Eq. 18.

the plaintiff has already broken (*y*). And it has refused to enforce an agreement for a yearly tenancy, on the ground of the adequacy of the legal remedy (*z*).

II. *Contracts relating to Personal Chattels.*

1. These are distinguishable from contracts relating to land, not by any difference in the principle on which they are treated, but because from their nature a breach thereof has usually a complete remedy at law.

General distinction from contracts respecting land.

The leading authority respecting this part of the subject is

CUDDEE v. RUTTER.

[5 Vin. Ab. 538, pl. 21 ; 1 W. & T. L. C. 848.]

This was a bill to transfer £1,000 South Sea Stock which the defendant had agreed to transfer at the rate of 104 per cent. Before the time specified for the delivery the stock rose largely in value ; the defendant did not deliver the stock, but offered to pay the difference, and so submitted by his answer. Lord Chancellor Parker dismissed the bill on the ground that one £1,000 stock was as good as another, which the plaintiff might have bought of any person on the same day. If the plaintiff, therefore, had accepted payment of the difference from the defendant, he would not have suffered at all by the fact that the agreement was not specifically performed. The case was very different from that of lands of which one parcel could rarely be substituted for another with the same convenience to the purchaser, though it might be of the same market value.

2. The legal remedy therefore being adequate, there is generally no ground for the exceptional and discretionary interference of equity in contracts respecting personal chattels. Special circumstances may, however, induce the Court to decree specific performance of such contracts ;

Specific performance only granted in special circumstances.

(*y*) *Jones v. J.*, 12 Ves. 186, 188. (*z*) *Clayton v. Illingworth*, 10 Ha. 451.

and these may be classed under three heads; first, where there is some peculiar difficulty in applying the legal remedy; secondly, where there is some peculiarity in the position of the parties, which gives a special claim for equitable assistance; thirdly, where the jurisdiction arises from the peculiarity of the subject-matter of the contract.

(1.) Where there is difficulty in applying the legal remedy.

E.g. in estimating the damages.

(1.) In the following cases, the difficulty of applying the legal remedy was held to give jurisdiction to equity to insist on specific performance.

In *Taylor v. Neville* (a) specific performance was decreed of a contract for sale of 800 tons of iron to be delivered and paid for in a certain number of years, and by instalments, Lord Hardwicke stating as the reason of his decision that as the profit upon the contract depended upon future events, it could not be correctly estimated in damages, but a calculation thereof could only proceed upon conjecture.

For a similar reason specific performance was decreed of a contract to pay the plaintiff a certain annual sum for his life, and also a certain other sum for every hundredweight of brass wire manufactured by him during his life at certain mills (b).

In *Buxton v. Lister* (c) Lord Hardwicke puts the case of a ship's carpenter purchasing timber which was peculiarly convenient to him by reason of its vicinity, and also the case of an owner of land covered with timber contracting to sell the timber in order to clear the land, and assumes that as damages would not be a complete remedy, specific performance of such contracts would be decreed.

In *Adderley v. Dixon* (d) specific performance was, at the suit of the vendor, decreed of an agreement to purchase certain debts which had been proved under two commissions of bankruptcy, on the ground that damages at law could not accurately represent the value of the future dividends, and could only be conjectural.

(a) Cited in *Buxton v. Lister*, 3 Atk. 384.

(b) *Bull v. Coggs*, 1 Bro. P. C.

(c) *Sup.*

(d) 1 S. & S. 607.

Similar principles have led to the enforcement of contracts for the purchase of annuities (*e*), and of a patent (*f*).

(2.) Jurisdiction is sometimes founded on some special relation between the parties.

(2.) Special relation between the parties. Remedy must be mutual.

(i.) Thus, on the ground that the remedy ought to be mutual, a plaintiff is sometimes assisted, when it might have been thought that damages would have completely compensated him. This argument was used in *Adderley v. Dixon* (*g*) above quoted, and also in the cases respecting annuities, where the vendor was assisted, though his demand was only for a money payment. The same principle was relied on in the suits against railway companies for the completion of purchases of land, already discussed. And it seems established that where one party to a contract has a right to ask for specific performance, the other party will also be entitled to similar assistance, notwithstanding that a simple money payment would seem to indemnify him.

(ii.) Again, if a trust be created, the circumstance that the subject-matter of the trust is a personal chattel will not prevent the Court from enforcing due execution of the trust, whether against the trustees or persons obtaining possession of the property with notice (*h*).

Trusts.

(iii.) The relation of principal and agent and other similar relations have also been held to be sufficient to move a Court of equity where it would otherwise have left the parties to law. Where a fiduciary relation subsists between the parties, whether it be the case of an agent, or a trustee or a broker, or whether the subject-matter be stock or cargoes or chattels of whatever description, the Court will interfere to prevent a sale, either by the party entrusted with the goods, or by a person claiming under him (*i*).

Principal and agent.

(*e*) *Clifford v. Turrell*, 1 Y. & C. C. 138; *Kenney v. Wecham*, 6 Madd. 355.

(*f*) *Cogent v. Gibson*, 33 Beav. 557.

(*g*) *Sup.*

(*h*) *Pooley v. Budd*, 14 Beav. 34, 43, 44; *Stanton v. Percival*, 5 H. L. 257.

(*i*) *Wood v. Rowcliffe*, 2 Ph. 382.

(3.) Peculiarity of the subject matter.

(3.) The cases most frequently referred to as illustrating the interference of equity in a transaction respecting chattels on the ground of the peculiarity of the subject-matter of the contract are

PUSEY v. PUSEY

[1 Vern. 273 ; 1 W. & T. L. C. 890],

and

SOMERSET v. COOKSON

[3 P. Wms. 389 ; 1 W. & T. L. C. 891].

In the former of these cases the unique Pusey horn was ordered to be specifically delivered up to the plaintiff, and in the latter a curious Greek altar piece. It is clear that it would be a most insufficient remedy to decree payment of the intrinsic value of such articles as these, which could not at any price be replaced.

Heirlooms,
&c.

(i.) These cases are typical of one division of this class. Heirlooms, and chattels of unique character, may evidently be said to partake of the quality of land in that they may be of much greater value to one person than to another. Their value to a given person is not estimable in damages (*k*). Within the same principle have been included pictures and other works of art (*l*). But where by the terms of the agreement and the frame of the pleadings, the plaintiff, seeking restitution of a picture had in effect put a fixed price upon it, it was held that damages would be an adequate remedy, and equity refused to interfere (*m*).

Deeds and
writings.

(ii.) On the same principle the Court will order the delivery up of specific deeds and writings to the persons legally entitled thereto (*n*).

In suits of this nature it is not necessary in equity as it was in law to prove conversion or resistance to deliver them up when sought to be recovered (*o*).

(*k*) *Fells v. Read*, 3 Ves. 70.

(*l*) *Falcke v. Gray*, 4 Drew, 651,
658 ; *Dowling v. Betjemann*, 2 J. &
H. 544.

(*m*) *Ibid.*

(*n*) *Brown v. B.*, 1 Dick. 62 ; *Jack-*

son v. Butler, 2 Atk. 306 ; *Reece v.*
Trye, 1 De G. & Sm. 273 ; *Gibson v.*
Ingo, 6 Hare, 112.

(*o*) *Turner v. Letts*, 20 Beav. 185,
191.

(iii.) More numerous are the cases which have arisen out of contracts for the sale of shares in railways and joint-stock companies. In *Duncuft v. Albrecht* (*p*) a distinction was drawn between railway shares and public stock, the former being limited in number, and not always obtainable (*q*). Shares in a joint-stock company have been similarly dealt with (*r*), and it was considered no bar to the jurisdiction that by the deed of settlement, shareholders could only transfer their shares in such a manner as the directors should approve. On the other hand, specific performance has been refused where the directors' assent, which was necessary in order to place the purchaser's name on the register, has been refused (*s*), though if the directors wantonly or unreasonably refused to admit a purchaser, the Court might compel them to do so and enforce specific performance of the contract (*t*).

An agreement to accept a transfer of railway shares on which nothing has been paid may be enforced, as an agreement for valuable consideration, in consequence of the liabilities to which the purchaser is subjected, and from which the vendor is relieved upon the transfer (*u*). And where specific performance has been decreed of a contract to purchase railway shares, the Court will order the purchaser to pay any calls that have been made since the sale, to indemnify the vendor against all future calls in respect of the shares, and to take proper measures to procure himself to be registered (*x*).

An agreement to accept shares in a joint-stock company will be specifically enforced in equity, if the directors are prompt in instituting proceedings for that purpose (*y*); and

Sale of
shares in
companies.

Agree-
ments to
accept
shares.

(*p*) 12 Sim. 189.

(*q*) *Shaw v. Fisher*, 2 De G. & Sm.

11.

(*r*) *Poole v. Middleton*, 29 Beav. 646.

(*s*) *Birmingham v. Sheridan*, 33 Beav. 660.

(*t*) *Ib.* 665; *Robinson v. The*

Chartered Bank, 1 Eq. 32.

(*u*) *Cheale v. Kenward*, 3 De G. & J. 27.

(*x*) *Wynne v. Price*, 3 De G. & Sm. 310.

(*y*) *New Brunswick &c. Co. v. Muggerridge*, 4 Drew, 686; *Oriental &c. Co. v. Briggs*, 2 J. & H. 625.

in the absence of deception it is no objection that a call has been made on the shareholders, of which the purchaser had no notice (*z*). *Secus* if the purchase was made, or even the money paid and a transfer executed in ignorance that a winding-up petition had been presented (*a*).

Ships.

(iv.) The Acts for the regulation of British shipping (*b*) have modified the action of equity as to the contracts respecting British ships. As, under the operation of the Acts there can be no transfer in equity which is not a transfer at law, equity will not enforce a contract for the purchase of a British ship or of shares therein (*c*). But since 25 & 26 Vict. c. 63, it has been decided that where there has been a complete transfer of a ship there is nothing in the previous Act which prevents the transferor from showing that the real intention of the parties was that the instrument should operate as a security only for the money advanced (*d*). The provisions of the Ship Registry Acts apply equally to contracts and sales, and negative any equity resulting out of the doctrine of notice (*e*). The Court has jurisdiction to compel a foreigner to specifically perform a contract for sale of a foreign ship (*f*).

Goodwill
of business.

(v.) Where the goodwill of a business is altogether or principally annexed to the premises on which it is carried on, a contract for the sale of the goodwill and premises may be enforced in equity (*g*); but the Court will not decree specific performance of a contract for the sale of the goodwill of a business unconnected with the premises (*h*).

Sales at a
valuation.

(vi.) We may here conveniently treat of contracts for sale at a price to be determined by arbitration or valuation. In these cases, unless the price be fixed in the manner determined upon so as to be made part of the agreement,

(*z*) *Hawkins v. Maltby*, 3 Ch. 188;
4 Ch. 200, 202.

(*a*) *Emmerson's Case*, 1 Ch. 433.

(*b*) 8 & 9 Vict. c. 89; 17 & 18 Vict.
c. 104.

(*c*) *Hughes v. Morris*, 2 De G. M.
& G. 349.

(*d*) *Ward v. Beck*, 9 Jur. N. S. 912.

(*e*) *McCalmont v. Rankin*, 2 De G.
M. & G. 403.

(*f*) *Hart v. Herwig*, 8 Ch. 860.

(*g*) *Cruttwell v. Lye*, 17 Ves. 335.

(*h*) *Baxter v. Conolly*, 1 J. & W.
576.

specific performance will not usually be decreed (*i*). But if the vendor refuses to allow a valuer to enter to make a valuation, the Court will make a mandatory order to compel the vendor to allow him to enter, and to enable the valuation to proceed (*k*). And where the fixing of the value by arbitrators is not of the essence of the agreement, the Court will carry the agreement into effect, and will, itself, if necessary, ascertain the value (*l*).

III. *Contracts relating to Personal Acts.*

1. Of these we will consider first, as being of a somewhat special nature, contracts to perform certain acts relating to land, such as contracts to build or repair.

As a general rule, such contracts will not be specifically enforced (*m*). In the first place, the legal remedy is usually sufficient; secondly, it would be almost impossible for the Court to carry out its decree if made (*n*). Where the agreement to build or repair is incidental to a contract of which the specific performance would be ordinarily decreed, such as a contract to grant a lease, the Court will decree specific performance as regards the lease, and at the same time, if necessary, direct an inquiry as to damages under Lord Cairns' Act as above described (*o*).

Nevertheless, the Court has jurisdiction to decree performance of certain works, where damages would not be an adequate remedy. Thus a railway company has been decreed to construct and maintain an archway under an embankment which traversed the plaintiff's property (*p*). In this and other similar cases, one motive which induces equity to relieve is the inability of the plaintiff to enter on

Acts relating to land.

Contracts to build or repair not generally enforced.

Exceptions.

(*i*) *Milnes v. Gery*, 14 Ves. 400; 348; *S. W. R. Co. v. Wythes*, 1 K. Richardson v. Smith, 5 Ch. 648. & J. 186.

(*k*) *Smith v. Peters*, 20 Eq. 511.

(*l*) *Dinham v. Bradford*, 5 Ch. 519.

(*m*) *Errington v. Aynesley*, 2 Bro. C. C. 341.

(*n*) *Brace v. Wehnert*, 25 Beav.

(*o*) *Middleton v. Greenwood*, 2 De G. J. & S. 142.

(*p*) *Storer v. G. W. R. Co.*, 2 Y. & C. C. C. 48.

the land to do the work at his own cost, and so to ascertain the damages sustained by non-performance (*q*). Again, where there have been acts amounting to part performance of the contract, the Court will decree specific performance which it might otherwise have refused (*r*).

Modern
tendency
in favour
of granting
relief.

The general tendency of modern decisions is towards granting the relief thus sought if possible (*s*). Hence it has been held no defence to an action against a railway company that specific performance would occasion great inconvenience to the public (*t*), or that the contract was *ultra vires*, or that the Attorney-General was a necessary party, as representative of the public (*u*).

As to part-
nership.

2. Passing now from contracts for works on land, we note that Courts of equity will not, as a rule, decree specific performance of an agreement to enter into and carry on a partnership (*x*). This rule has been sometimes departed from; for instance, where the agreement was for a partnership for a fixed and definite time, and there had been a part performance (*y*); but to warrant it the circumstances must be strong (*z*).

Hiring and
service.

3. Again, as contracts of hiring and service are of a confidential character, and cannot, therefore, advantageously be enforced against an unwilling party, equity now refuses to decree specific performance of them (*a*). The same remark applies to the contract of agency (*b*).

Separation
of husband
and wife.

4. On special grounds agreements for separation of husband and wife, with the execution of the necessary deeds, will be enforced, provided there be a good consideration to support the contract; as, for instance, a covenant by trustees

(*q*) *South Wales R. Co. v. Wythes*,
1 K. & J. 186, 200.

(*r*) *Price v. Corp. of Penzance*, 4
Ha. 506, 509.

(*s*) *Wilson v. Furness Ry. Co.*, 9
Eq. 28, 33.

(*t*) *Raphael v. T. V. R. Co.*, 2 Ch.
147.

(*u*) *Wilson v. Furness Ry. Co.*,
supra.

(*x*) *Scott v. Rayment*, 7 Eq. 112.

(*y*) *Anon.*, 2 Ves. sr. 629; *Eng-
land v. Curling*, 8 Beav. 129.

(*z*) *Downs v. Collins*, 6 Ha. 418,
437; *Lindley*, 914.

(*a*) *Johnson v. S. & B. Ry. Co.*,
3 De G. M. & G. 914.

(*b*) *Chinnock v. Swinsburg*, 30 L. J.
N. S. Ch. 409.

to indemnify the husband against the wife's debts (*c*), or the wife's acceptance of maintenance from her husband instead of proceeding against him for divorce (*d*).

5. A Court of equity will not decree the specific performance of a covenant to refer disputes to arbitration (*e*), at least if the agreement to submit does not contain a covenant not to take proceedings at law or in equity. If there is such a restrictive covenant, it may seemingly be pleaded in bar of proceedings in any superior Court (*f*). And where there is in a contract an agreement to refer matters in dispute to arbitration under the Common Law Procedure Act (*g*), a Court of equity, although it may have jurisdiction to decide the question at issue, will on motion stay proceedings, and refer the matters to arbitration according to the Act (*h*).

Agreements to refer to arbitration.

As to cases arising on contracts for sale of goods at a price to be fixed by valuation, see *supra*, p. 586.

The Court will decree specific performance of an award, where it is to do anything *in specie*, as to convey an estate or assign securities (*i*), but not, it seems, an award to pay money (*k*). In short, the award is treated as an agreement between the parties, and will be enforced where an agreement would be enforced, not otherwise (*l*).

Awards.

6. A Court of equity will not specifically enforce a contract to lend (*m*), nor a contract to borrow (*n*), or to pay money (*o*); but it will always decree specific performance of an agreement to execute a mortgage in consideration of money due (*p*), or an agreement by parol to execute a bill

Borrowing and lending.

Agreement for mortgage.

(*c*) *Gibbs v. Harding*, 5 Ch. 336; *Wilson v. W.*, 1 H. L. 538; 5 H. L. 40.

(*d*) *Hobbs v. Hull*, 1 Cox, 445.

(*e*) *Street v. Digby*, 6 Ves. 815.

(*f*) *Halfhide v. Fenning*, 2 Bro. C. C. 336; *Cooke v. C.*, 4 Eq. 77.

(*g*) 17 & 18 Vict. c. 125.

(*h*) *Willesford v. Watson*, 14 Eq. 572; 8 Ch. 473; *Wheatley v. Westminster &c. Co.*, 2 Dr. & Sm. 347.

(*i*) *Norton v. Mascall*, 2 Vern. 24.

(*k*) *Hall v. Hardy*, 3 P. Wms. 190.

(*l*) *Blackett v. Bates*, 1 Ch. 117.

(*m*) *Sichel v. Mosenthal*, 30 Beav. 371.

(*n*) *Rogers v. Challis*, 27 Beav. 175.

(*o*) *Crampton v. The Varna Ry. Co.*, 7 Ch. 562.

(*p*) *Ashton v. Corrigan*, 13 Eq. 76.

of sale of personal chattels to secure the plaintiff against certain liabilities (*q*).

Negative
contracts,
how
enforced.

7. Where a person has entered into a contract not to do a thing, specific performance of such a negative contract takes the form of an injunction. Thus the ringing of a bell (*r*), carrying on a trade (*s*), acting on the stage (*t*), erecting buildings (*u*), making applications to Parliament (*x*), and various other acts have been restrained, where they have been contrary to agreement. But the Court will not compel by injunction the doing of something which involves continuous employment for an indefinite period (*y*). Nor will it restrain the doing of an act which is merely ancillary to an agreement of which it cannot compel specific performance (*z*).

(*q*) *Taylor v. Eckersley*, 2 Ch. D. 302; 5 Ch. D. 740.

(*r*) *Martin v. Nutkin*, 2 P. Wms. 266.

(*s*) *Barret v. Blagrave*, 5 Ves. 555.

(*t*) *Lumley v. Wagner*, 1 De G. M. & G. 604.

(*u*) *Rankin v. Huskisson*, 4 Sim.

13.

(*x*) *Ware v. Grand Junction Co.*, 2 Russ. & My. 470; *Exp. Hartridge*, 5 Ch. 671.

(*y*) *Powell &c. Co. v. Taff Ry. Co.*, 9 Ch. 331.

(*z*) *Merchants' Co. v. Banner*, 12 Eq. 18.

SECTION III.—DEFENCE OF THE STATUTE OF FRAUDS.

I. *Part Performance.*Lester *v.* Foxcroft.II. *Other grounds for Relief.*III. *Evidence as to Parol Variations.*Townshend *v.* Stangroom.

In discussing in the last section the general principles by which equity was guided in dealing with claims for specific performance, we postponed for separate examination that extensive class of cases arising from contracts respecting land in which a non-compliance with the Statute of Frauds is set up as an objection to the interference of equity. To this we now revert.

The Statute of Frauds (*a*) enacts that “no action shall be brought upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.” Notwithstanding this enactment, there are many cases in which, though the Courts of Common Law would not have assisted the plaintiff, Equity has interfered out of its regard for considerations which the Common Law refused to recognise. This has been especially the case where the party seeking relief has been put into a situation which makes it against conscience in the other party to insist on the want of writing signed according to the statute, as a bar to the relief. The principle on which these cases rest is that even an Act of Parliament shall not be used as

Statute of
Frauds,
29 Car. II.
c. 3, s. 4.

Statute
may not
be used as

(*a*) 29 Car. II. c. 3, s. 4.

an instrument of fraud.

an instrument of fraud. The Court does not, indeed, affect to set aside the Act of Parliament, but it fastens on the individual who seeks against conscience to avail himself of it, and imposes on him a personal obligation.

I. *Part Performance.*

Ground of interference.
1. Part performance.

The majority of the cases, in which relief is on this ground granted, are deemed to be taken out of the statute by the fact that the agreement on which they rest has been in part performed by the plaintiff. Among them a leading authority is

LESTER v. FOXCROFT

[1 Colles. P. C. 108 ; 1 W. & T. L. C. 828],

in which specific performance of a verbal agreement to grant a lease was decreed, notwithstanding the Statute of Frauds, on the ground that in reliance thereon the lessee had incurred considerable expense and trouble in pulling down an old house and building new ones according to the terms of the agreement, it being considered against conscience under such circumstances for the defendant to plead the statute.

The inquiry is thus suggested as to what circumstances are considered by equity sufficient to render it against conscience to allow the Statute of Frauds to stand as a bar to the relief sought, and particularly as to the effect of part performance.

Acts must be referable to the agreement.

1. The acts alleged as amounting to part performance must be such as are not only referable to the alleged agreement, but such as are referable to no other title. And again, they must be acts so clear, certain, and definite in their object and design, as to refer exclusively to a complete and perfect agreement of which they are part execution.

Not merely introductory or ancillary.

Thus acts merely introductory or ancillary to an agreement, although attended with expense, are not considered acts of part performance. Under this head are

included the delivery of abstracts of title, giving orders for conveyances to be drawn and engrossed, going to view an estate, employing surveyors to value timber on an estate, or appraisers to value stock or land, registering deeds, and similar acts of an equivocal nature, which will not suffice to take a case out of the statute (*b*).

2. Part payment, or even entire payment of the purchase-money, is not sufficient to entitle to relief. Here the legal remedy would be quite adequate, return of the money, with interest, being a complete redress (*c*). Part payment not sufficient.

3. Whether or not admission into the possession of an estate will be considered part performance depends on circumstances. If it has unequivocal reference to the contract, it is sufficient. That a stranger should be found in acknowledged possession of the land of another is strong evidence of an antecedent agreement, and is usually sufficient to warrant an application for relief in equity (*d*); *a fortiori* where (as in the principal case), in addition to possession, the plaintiff has laid out money on the land (*e*). Possession, when sufficient.

On the other hand, if the possession can be reasonably accounted for apart from the alleged contract, it will not suffice: for instance, if in a suit for the specific performance of an alleged agreement for a lease, the tenant was in possession under a previous tenancy, he cannot set up that as a part performance (*f*). Or if a farm tenant from year to year continues in possession, and lays out such moneys as are usual in the ordinary course of husbandry, this is no part performance (*g*). Such continuance in possession, however, if accompanied by payment of an When not so.

(*b*) *Hawkins v. Holmes*, 1 P. Wms. 770; *Pembroke v. Thorpe*, 3 Swanst. 437, n.; *Whitchurch v. Bevis*, 2 Bro. C. C. 559, 566; *Cooth v. Jackson*, 6 Ves. 17; *Phillips v. Edwards*, 33 Beav. 440.

(*c*) *Clinan v. Cooke*, 1 S. & L. 22, 40; *Hughes v. Morris*, 2 De G. M. & G. 349, 356.

(*d*) *Aylesford's Case*, 2 Str. 783; *Mundy v. Jolliffe*, 5 My. & Cr. 167; *Pain v. Coombs*, 1 De G. & J. 34, 46.

(*e*) *Crook v. Corp. of Seaford*, 6 Ch. 551.

(*f*) *Wills v. Stradling*, 3 Ves. 378.

(*g*) *Brennan v. Bolton*, 2 Dr. & War. 349.

increased rent, referable to the alleged agreement, has been held to be an act of part performance (*h*); and similarly, if, while continuing in possession, he has laid out money, not merely in ordinary acts of husbandry, but in a manner which points to a special agreement (*i*).

Moreover, where the fact of possession is set up as a part performance, it is essential that the possession should have been delivered according to the contract (*k*). It is evident that a wrongful possession could not operate as a title to the consideration of the Court.

Marriage
not suffi-
cient.

4. Marriage is not alone a part performance of an agreement in relation to it, the Statute of Frauds expressly enacting that every agreement made in consideration of marriage must be in writing (*l*). Nevertheless, a contract made in consideration of marriage may be taken out of the statute by acts of part performance independent of the marriage; for instance, by giving up possession of property agreed to be settled (*m*).

Representations
connected
with
marriage.

Again, where a person marries upon faith of representations or promises made to him for the purpose of influencing his conduct with reference to the marriage, the person making such representations or promises will be compelled in equity to make them good, not only at the instance of the person to whom they were made, but also at the instance of the issue of the marriage (*n*). The representation or promise must, however, be clear and absolute (*o*), and the marriage must be distinctly ascribable thereto (*p*). If it is contained in a lost document, parol evidence is admissible as to its contents (*q*). If there is a

(*h*) *Nunn v. Fabian*, 1 Ch. 35.

(*i*) *Mundy v. Jolliffe*, 5 My. & Cr. 167; *Sutherland v. Briggs*, 1 Ha. 26.

(*k*) *Cole v. White*, cited 1 Bro. C. C. 409.

(*l*) *Warden v. Jones*, 23 Beav. 487; 2 De G. & J. 76; *Caton v. C.*, 2 L. R. H. L. 127.

(*m*) *Surcombe v. Pinniger*, 3 De G.

M. & G. 571; *Ungley v. U.*, 5 Ch. D. 887.

(*n*) *Hammersley v. De Biel*, 12 C. & F. 45; *Walford v. Gray*, 13 W. R. 335, 761.

(*o*) *Randall v. Morgan*, 12 Ves. 67.

(*p*) *Goldicutt v. Townsend*, 28 Beav. 445.

(*q*) *Gilchrist v. Herbert*, 26 L. T. (N. S.) 381.

written agreement after marriage, in pursuance of a previous parol agreement, this takes the case out of the statute (*r*).

On a similar principle an injunction was granted to restrain the enforcement of a demand, the party seeking to enforce it having, while the marriage treaty was pending, falsely represented to the father of the lady that there was no such demand existing (*s*).

Where the representation is not of an existing fact, but of a mere intention, or where the promiser refuses to bind himself by a contract, giving the party to understand that he must rely upon his honour for the fulfilment of the promise, it has been held that the Court cannot enforce performance (*t*). A promise by a husband to leave property by will was held not to be enforceable (*u*).

5. Companies and corporations are equally with individuals bound by acts of part performance (*x*). An agreement by a corporation to let land upon lease, although not under seal, will be enforced against the corporation, where there have been acts of part performance on the part of the intended lessee (*y*). Contracts of companies, &c.

6. Sales of land by auction are generally within the Statute of Frauds. A purchaser, therefore, is not bound unless there is some agreement in writing (*z*). Auctions.

But if a purchaser takes possession after the sale, and commits acts of ownership, it will be held to be part performance, so as to entitle the vendor to enforce the sale as regards the lots so occupied and dealt with, though not of other lots sold at the same time (*a*). The signature of the auctioneer, or his clerk, has been held to satisfy the statute, on the ground that he is constituted agent of the

(*r*) *Surcombe v. Pinniger*, *sup*.

(*s*) *Neville v. Wilkinson*, 1 Bro. C. C. 543.

(*t*) *Maunsell v. White*, 4 H. L. 1039; *Jordan v. Money*, 5 H. L. 185; 15 Beav. 372; 2 De G. M. & G. 318.

(*u*) *Caton v. C.*, *sup*.

(*x*) *Wilson v. W. H. R. Co.*, 34 Beav. 187; 2 De G. J. & Sm. 475.

(*y*) *Crook v. Corp. of Seaford*, 6 Ch. 551.

(*z*) *Blagden v. Bradbear*, 12 Ves. 466, 472.

(*a*) *Buckmaster v. Harrop*, 13 Ves. 456, 474.

Miscellaneous
contracts.

purchaser by the act of bidding (*b*). But in order to this, the auction book must embody, or at least refer to, the conditions of sale (*c*).

Sales under a decree of the Court, or in bankruptcy, have been held to be excepted from the statute (*d*).

It has been said that the doctrine of part performance is not to be extended by the Court, and it was held inapplicable to a case in which a trustee had a power to lease at the request, *in writing*, of a married woman, and such request had not been made (*e*).

A parol agreement to sell or grant a lease entered into by a tenant for life with a leasing power, coupled with a part performance by the purchaser, or lessee, during the life of the tenant for life, will not bind the remainder-man, unless he is aware of the agreement and acquiesces (*f*), or unless, after the death of the tenant for life, he lies by and allows the purchaser or lessee to expend money in improving the estate (*g*).

A family arrangement for the division of land, although only verbal, has been carried out where there have been acts of part performance by the parties interested, such as holding and dealing with the land in accordance with the terms of the arrangement (*h*).

II. *Other grounds for Relief.*

Grounds
other than
part per-
formance.

There are grounds other than part performance, in consideration of which the Court, deeming it inequitable for a defendant to set up the statute as a defence, will decree specific performance.

(*b*) *Peirce v. Corf*, 9 L. R. Q. B. 210; *Bird v. Boulter*, 4 B. & Ad. 443.

(*c*) *Rishton v. Whatmore*, 8 Ch. D. 467.

(*d*) *Att.-Gen. v. Day*, 1 Ves. sr. 218; *Exp. Cutts*, 3 Deac. 267.

(*e*) *Phillips v. Edwards*, 33 Beav. 440.

(*f*) *Blore v. Sutton*, 3 Mer. 237.

(*g*) *Stiles v. Cowper*, 3 Atk. 692.

(*h*) *Williams v. W.*, 2 Dr. & Sm. 378; 2 Ch. 294.

1. Where the agreement was intended to have been in writing according to the statute, but this has been prevented from being done by the fraud of the defendant, equity has relieved. Otherwise the statute, designed to suppress fraud, would be used as a protection for it. Thus if one agreement is fraudulently substituted for another, or if in case of a loan on mortgage, it is agreed that the security is to be in the form of an absolute deed by the mortgagor and a defeasance by the mortgagee, and the absolute conveyance being executed, the mortgagee refuses to execute the defeasance, equity will grant relief (*i*). Fraud of defendant.

The principle that a statute shall not be made an instrument for covering a fraud has been illustrated by cases in which equity has not allowed parties to profit where they have fraudulently induced a person to make or refrain from altering a will, the mode of making which was formerly regulated by sections 5 and 19 of the Statute of Frauds, and is now by the Wills Act (*k*).

Thus if a person, knowing that a testator in making a disposition in his favour intends it to be applied for purposes other than his benefit, expressly promises, or by silence implies that he will carry the testator's intentions into effect, and the property is left to him upon faith of that promise or undertaking, it is in effect a trust, and the devisee will not be allowed to shelter himself behind the Wills' Act (*l*). It would be otherwise if the omission to declare the trust according to the statute arose from the neglect or error of the testator uninfluenced by the devisee (*m*). But *quære* whether the heir could claim on the ground of an absence of intention to benefit the devisee (*n*). The same principle applies to a case where property has been suffered to descend owing to similar representations made by the heir (*o*). Analogous cases under the Wills' Act.

(*i*) *Joynes v. Statham*, 3 Atk. 389 ; 204 ; *Muckleston v. Brown*, 6 Ves. 52 ; *Rowbotham v. Dunnott*, 8 Ch. D. 431.

(*k*) 1 Vict. c. 26.

(*l*) *Jones v. Badley*, 3 Ch. 364.

(*m*) *Addington v. Cann*, 3 Atk. 151.

(*n*) *Russell v. Jackson*, 10 Ha.

(*o*) *Stickland v. Aldridge*, 9 Ves.

516, 519 ; *McCormick v. Grogan*, 4

L. R. H. L. 82, 88.

See *supra* (p. 573) as to cases where the trusts intended would be contrary to the law ; *e.g.*, of mortmain.

The onus lies on the plaintiff of showing that a trust for a charity was communicated to and expressly or tacitly accepted by the devisees : if this is not admitted by the defendants it may be proved by evidence *aliunde* (*p*).

Admissions.

2. Where under the old practice the agreement alleged in the bill was confessed without more by the answer, it was enforced, the defendant being deemed to have waived the defence of the statute (*q*). If, however, though confessing the parol agreement, the defendant at the same time claimed the protection of the statute, this defence prevailed (*r*).

Mode of pleading.

Formerly the statute could be pleaded by demurrer, but it must now be done by statement of defence (*s*).

III. *Evidence of Parol Variations.*

Evidence as to parol variations in the contract.

The consideration of the effect of the Statute of Frauds in suits for specific performance cannot be dismissed without reference to the important class of cases which have turned upon the question of the admissibility of parol evidence of alleged variations from the written agreement.

Generally not admissible to support a claim for specific performance ; but admissible in defence.

The leading principle which guides the Court in deciding this question cannot be better illustrated than by reference to the case of

TOWNSHEND v. STANGROOM

[6 Ves. 328].

There a lessor filed a bill for specific performance of a written agreement for a lease, alleging a parol variation as to the quantity of land included ; and the lessee filed a cross-bill for specific performance of the agreement simply as written. Lord Eldon dismissed both bills ; the lessor's

(*p*) *Edwards v. Pike*, 1 Eden, 267.

(*q*) *Att.-Gen. v. Sitwell*, 1 Y. & C. 37.
Ex. C. 559.

(*r*) *Cooth v. Jackson*, 6 Ves. 12,

(*s*) *Catling v. King*, 5 Ch. D. 660.

because parol evidence was not admissible for him as plaintiff to set up an agreement different from that which was written; the lessee's because the very same evidence was admissible on the part of the lessor by way of defence (*t*).

1. These cases are conspicuous among many decisions which have well established the difference between the evidence which is available for a plaintiff seeking and a defendant resisting specific performance of a contract. Although the question as to the admissibility of parol evidence is affected by the Statute of Frauds, it does not wholly rest thereon. Independently of the Statute, by "the general rules of evidence, writing stands higher in the scale than mere parol testimony, and when treaties are reduced to writing such writing is taken to express the ultimate sense of the parties, and is to speak for itself. In the case of a contract respecting land, the general idea receives weight from the circumstance that you cannot contract at all on that subject but in writing; and this, therefore, is a further reason for rejecting parol evidence. In this way only is the Statute of Frauds material, for the foundation and bottom of the objection is in the general rules of evidence" (*u*).

The rule rests on general principles of law.

The rule, then, is that parol evidence on the part of a plaintiff seeking performance of a written contract with a variation supported by such evidence will be rejected, notwithstanding that the difference of the written from the real agreement is the result of fraud, accident, or surprise. Thus a plaintiff cannot adduce evidence to prove that lands comprised in a written agreement were by parol agreed to be left out of a lease (*x*), nor to prove verbal declarations at an auction in opposition to printed conditions of sale (*y*), nor that a written agreement to sell to two jointly was in reality an agreement to sell to one of them, and that the other was to have some interest in the premises by way of

General illustrations.

(*t*) See also *Woollam v. Hearn*, 7 Ves. 211.

(*x*) *Lawson v. Laude*, 1 Dick. 346.

(*y*) *Jenkinson v. Pepys*, cited, 1 V. & B. 528.

(*u*) *Davis v. Symonds*, 1 Cox, 402.

security for such part of the purchase-money as he might advance (z), nor in any similar case (u).

Exception.
Parol
variation
partly
performed.

2. On the principle, however, already explained in connexion with *Lester v. Foxcroft*, that part performance will serve the purpose of evidence which is otherwise wanting, it is established that when the alleged parol variation has been partly performed, specific performance of the written agreement with the parol variation will be decreed (b). In such cases the parol variation is in fact treated as a new agreement partly performed; and it is considered that such agreement having been acted upon, cannot be disregarded without injustice (c).

When
available
in defence.

3. It is equally well established that it is open to a defendant in certain circumstances to resist a claim for specific performance by means of parol evidence designed to show that the real agreement was not that which is represented in the writing, and that its enforcement would be, therefore, inequitable. This is, indeed, no infringement of the statute, which "does not say that a written agreement shall bind, but that an unwritten agreement shall not bind" (d).

The circumstances, always of much weight in equity, which entitle a defendant to make use of such evidence, are fraud, mistake, or surprise (e).

Where the terms of a written agreement have been ambiguous, so that, adopting one construction they may reasonably be supposed to have an effect which the defendant did not contemplate, the Court has on that ground refused to enforce the agreement (f); the author of the ambiguity has even himself had the benefit of this principle (g).

(z) *Davis v. Symonds*, 1 Cox, 402.

(a) *Clinan v. Cooke*, 1 S. & L. 22, 30.

(b) *Anon.*, 5 Vin. Abr. 522, tit. 38; *Legul v. Miller*, 2 Ves. sr. 299.

(c) *Pitcairn v. Osbourne*, 2 Ves. sr. 375.

(d) *Clinan v. Cooke*, 1 S. & L. 22, 39.

(e) *Joynes v. Statham*, 3 Atk. 388; *Clowes v. Higginson*, 1 V. & B. 524; *Mausser v. Back*, 6 Ha. 443.

(f) *Calverley v. Williams*, 1 Ves. 210; *Clowes v. Higginson*, 1 V. & B. 524.

(g) *Neap v. Abbott*, C. P. Coop. 333.

The admissibility of parol evidence in defence is not, moreover, confined to matter collateral to and independent of the written agreement, but may amount even to a contradiction of it (*h*).

It is not sufficient, however, to entitle the vendor to the benefit of such evidence, that the contract is not precisely such as he expected it to be. A mere unproved suspicion of fraud in the plaintiff (*i*), or a mistake in law, or as to the legal effect of the contract, or the legal consequences of an act (*h*), or a mistake as to the interest which the purchase will enable a person to acquire (*l*), cannot be set up as a defence. And if mistake of fact is alleged it must be clearly proved (*m*). Further, an inadvertent omission to propose an intended term to an agreement (*n*), or its purposed omission, upon the supposition that it was illegal, is not sufficient (*o*). When not so.

4. An analogous class of cases is that in which two contracts are alleged by the defendant to be mutually dependent, and he claims to resist the performance of one until the plaintiff performs the other, parol evidence being necessary to connect the two. In *Croome v. Lediard* (*p*) such evidence was rejected, and the plaintiff's prayer granted, though the defendant could not make a good title to the estate he wished to sell, and he sought to prove that the whole transaction was intended as an exchange. Lord Brougham rejected the tendered evidence, on the ground that evidence of matter *dehors* the written agreement was not admissible to alter the terms and substance of the contract; though evidence of matter collateral to it might be received. But Lord St. Leonards, in commenting on the case, has con- Mutually dependent contracts.

(*h*) *Ramsbottom v. Gosden*, 1 V. & B. 165; *Winch v. Winchester*, *ib.* 375.

(*i*) *Lightfoot v. Heron*, 3 Y. & C. Ex. 586.

(*k*) *Cooper v. Phibbs*, 2 L. R. H. L. 149; *Powell v. Smith*, 14 Eq. 85; *G. W. R. v. Cripps*, 5 Ha. 91.

(*l*) *Mildmay v. Hungerford*, 2

Vern. 243.

(*m*) *Darnley v. L. C. & D. R.*, 2 L. R. H. L. 43.

(*n*) *Parker v. Taswell*, 2 De G. & J. 559.

(*o*) *Irnhum v. Child*, 1 Bro. C. C. 92; see also *Cross v. Berridge*, 8 Ch. 359.

(*p*) 2 My. & K. 251.

sidered that the proper ground was the absence of any proof of fraud, mistake, or surprise (*q*).

Parol
waiver.

Sub-
sequent
variation.

Contem-
poraneous
variation.

Plaintiff
may assent
to parol
variation.

5. A clearly proved parol waiver of a written contract, amounting to a complete abandonment, will bar specific performance (*r*). And where a written agreement is *subsequently* varied by parol, upon proceedings being taken for specific performance with or without the variation, the Court will, it seems, put the defendant to his election, and if he declines to elect will decree specific performance of the agreement without the variation (*s*). But it seems that parol evidence of a contemporaneous variation in or addition to an agreement which was by admission correctly put into writing, is not admissible as a defence to specific performance (*t*).

6. Although it will be a good defence to show that a written agreement does not contain a provision in favour of a defendant verbally agreed upon between the parties, nevertheless, when such a verbal agreement is alleged the plaintiff may, by submitting to perform the omitted provision, and in the absence of fraud or mistake with reference to it, obtain a decree for performance of the whole contract (*u*). And there are many cases in which the effect of the evidence has been, not to defeat the plaintiff's claim to specific performance, but to lead the Court to perform the contract, taking care that the parol agreement is also carried into effect, so that all the parties may have the benefit of what they contracted for (*x*).

(*q*) Sugd. V & P. 163, 14th ed.;
Lloyd v. L., 2 My. & Cr. 192.

(*r*) *Price v. Dyer*, 17 Ves. 356.

(*s*) *Robinson v. Page*, 3 Russ. 114.

(*t*) *Ormerod v. Hardman*, 5 Ves.
722.

(*u*) *Martin v. Pycroft*, 2 De G. M.
& G. 785.

(*x*) *Ramsbottom v. Gosden*, 1 V. &
B. 165; *L. & B. R. Co. v. Winter*,
Cr. & Ph. 57; *Smith v. Wheatcroft*,
9 Ch. D. 223.

SECTION IV.—SPECIFIC PERFORMANCE WITH A VARIATION.

Contrast of Law and Equity.

Seton v. Slade.

I. *Where the Dispute relates to Time.*

1. *When time is essential.*
2. *When not so.*
3. *Compensation.*

II. *Where the Dispute relates to Quantity or Quality.*

1. *In vendors' suits.*
2. *In purchasers' suits.*

Having examined the general principles which determine whether or not a suit for specific performance of a contract will lie in equity, we are now led to consider the force of a peculiar class of defences which may be used in answer to such a claim, and to observe the manner in which equity deals therewith. There is scarcely any branch of the subject of equitable jurisdiction more fertile with illustrations of the contrast between the principles and methods of equity and those which prevail in the Courts of Common Law.

In the important case of

SETON v. SLADE

[7 Ves. 265; 2 W. & T. L. C. 501]

the defendant agreed to purchase certain property from the plaintiff. The memorandum of agreement was signed by him, but not by the plaintiff. One of the terms thereof was that a good title to the property was to be made within two months, and the purchase was to be completed within that time. The abstract of title was only delivered within a few days of the expiration of the two months, but the defendant received and retained it

Defences peculiar to suits for specific performance.

without objection until the expiration of the two months. On a bill for specific performance of the agreement, it was held that the defendant could not insist on the time as of the essence of the contract, and specific performance was decreed.

In many respects analogous to this are other cases in which the dispute as to performance rests not upon the question of time, but upon the fact that the vendor has not the same interest in the estate as that which he contracted to sell ; or that there is some deficiency in the quantity or quality of it. In such cases a party not able strictly to perform his contract had no remedy at law by way of damages ; but in equity he might often obtain specific performance, adequate compensation being allowed for the partial departure from the contract.

At the suggestion therefore of this case we may conveniently investigate the general circumstances under which, though the plaintiff cannot strictly carry out his agreement, he will obtain specific performance on allowing compensation.

Applica-
tion by
summons
under
37 & 38
Vict. c. 78,
s. 9.

This is a fitting place in which to mention a recent useful enactment which has been the means of saving considerable expense in case of disputes such as we are about to consider. By the Vendor and Purchaser Act, 1874 (*y*), it is provided that a vendor or purchaser of real or leasehold estate in England may apply in a summary way to a Judge in Chambers in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of the contract (not being a question affecting the existence or validity of the contract), and the judge shall make such order upon the application as to him shall appear just.

I. *Where the Dispute relates to Time.*

Time
formerly

In the Courts of law previous to the passing of the Judicature Act of 1873, time was in all cases considered

(*y*) 37 & 38 Vict. c. 78, s. 9.

as of the essence of the contract. By that Act, however, it is enacted (z) that "stipulations in contracts as to time or otherwise, which would not before the passing of this Act have been deemed to be, or to have become, of the essence of such contracts in a Court of equity, shall receive in all Courts the same construction and effect as they would have heretofore received in equity." Equitable principles, therefore, in this as in other matters now prevail in all the Courts; so that when we speak hereafter of a distinction between the rules of law and equity, we must be understood to refer to the state of things previous to the 1st of November, 1875.

essential at law.
Judicature Act, s. 25, sub.-s. 7.

Though, as in the principal case, equity usually considers time to be a circumstance, and not of the essence of a contract, there are other cases in which its treatment is as strict as that of law. It will be well, therefore, to consider these classes of contracts separately; and first, the smaller and exceptional class.

1. *Where time is deemed essential.*

Equity is induced to treat time as of the essence of a contract either in consideration of the nature of the property concerned, or on account of the special agreement to that effect of the parties.

Time, when essential in equity.

(1.) From the nature of the property.

(i.) Where the thing is of greater or less value, according to the effluxion of time, such as a reversion, equity requires strict adherence to time. Such contracts are generally occasioned by the vendor's present want of money, and to give him interest thereon during a long delay is no compensation to him (a). Within the same principle is included property of an unusually fluctuating value, such as a mining lease, or foreign stock (b); or of a wasting character, as a life annuity or leaseholds (c).

Property of fluctuating value.

(ii.) The purpose of the purchase is often considered as Purpose

(z) Sect. 25, sub.-s. 7.

533; *Doloret v. Rothschild*, 1 S. & S.

(a) *Newman v. Rogers*, 4 Bro. C. C.

590.

393. (c) *Hudson v. Temple*, 29 Beav.

(b) *Macbryde v. Weeks*, 22 Beav.

536.

of the purchase. influencing the construction of the contract: thus time is insisted on where premises are needed for commercial purposes (*d*), or with a view to immediate residence (*e*), or the money is required for paying off debts of the vendor (*f*).

Sale of public-house. (iii.) In the absence of express stipulation to the contrary, time is always regarded as essential in the sale of a public-house as a going concern (*g*), and the license must be transferred promptly.

Right of pre-emption. (iv.) An option to purchase under a right of pre-emption is always construed strictly, and must be exercised at the time prescribed (*h*).

By special agreement of the parties. Generally. (2.) By special agreement of the parties.

(i.) It was at one time held that the parties could not make time of the essence of a contract any more than they could contract themselves out of the operation of the principles of equity as to the redemption of mortgages, or the penalties of bonds; but it is now established that if by the contract it clearly appears to be the intention of the parties, if for instance, they stipulate that the agreement shall be void unless the purchase be completed on a given day, equity will treat the fixture of time as essential (*i*).

Stipulation must be strict. It nevertheless requires a very strict stipulation to effect that object (*k*). A mere stipulation that an abstract shall be given, or possession delivered on a named day, will not suffice (*l*). A stipulation that time shall be of the essence of the contract with regard to one of the steps towards completion, raises a presumption that it was not intended to be so with regard to others (*m*); and if the contract evidently contemplates an extension of the time beyond the day fixed, as by fixing interest to be thereafter

(*d*) *Parker v. Frith*, 1 S. & S. 419; *Hudson v. Temple*, 29 Beav. 536.

(*e*) *Tilley v. Thomas*, 3 Ch. 61.

(*f*) *Popham v. Eyre*, Loft. 786.

(*g*) *Day v. Lukke*, 5 Eq. 336.

(*h*) *Brooke v. Garrod*, 3 K. & J. 608.

(*i*) *Hudson v. Bartram*, 3 Madd. 440; *Boehm v. Wood*, 1 J. & W.

(*k*) *Webb v. Hughes*, 10 Eq. 286.

(*l*) *Roberts v. Berry*, 3 De G. M. & G. 284; *Tilley v. Thomas*, *sup.*

(*m*) *Wells v. Maxwell*, 32 Beav. 408.

paid upon the purchase-money, time will not be strictly regarded (*n*).

Though time be not originally of the essence, yet, where there has been great and unreasonable delay on one side, the other party has a right to fix a reasonable time within which the contract is to be completed, and that time will be regarded and insisted on by equity (*o*). But the notice to be effective must be reasonable (*p*). Notice pending negotiations.

(ii.) If time has been made of the essence of the contract by agreement, or is considered so by reason of the nature of the property, or becomes so by notice during progress of the transaction, it may be enlarged or waived by subsequent agreement, or by conduct of the parties. Thus if negotiations go on after the fixed time has passed, it amounts to a waiver (*q*), unless the negotiations were expressly conditioned to be without prejudice to the legal position (*r*). And if, as in *Seton v. Slade* (*s*), the purchaser is aware of the objections to the title, or if he receives the abstract after the day appointed, or proceeds with the purchase after the completion of the time fixed, unless, at least, he does so under protest (*t*), he will be held to have waived his right to object to the delay, and will not be able to resist specific performance (*u*). And likewise, if a vendor receives and entertains the requisitions of the purchaser after the time specified, unless he reserves his right he will be deemed to have waived it (*x*). The time within which objections are to be made to a title may, of course, be enlarged by the vendor's consent (*y*). Enlargement of time and waiver.

(iii.) The vendor may, it seems, insist upon the contract being rescinded, where circumstances exist which render it improbable that the purchase-money can be paid for a Ground of rescission.

(*n*) *Webb v. Hughes*, *sup.*

(*o*) *King v. Wilson*, 6 Beav. 126.

(*p*) *Wells v. Marvell*, *sup.*

(*q*) *Boyes v. Liddell*, 6 Jur. 725 ;
Pegg v. Wisden, 16 Beav. 239.

(*r*) *Tilley v. Thomas*, *sup.*

(*s*) *Supra*, p. 603.

(*t*) *Magennis v. Fallon*, 2 Moll. 576.

(*u*) *Pincke v. Curteis*, 4 Bro. C. C. 329 ; *Hoggart v. Scott*, 1 Russ. & My. 293.

(*x*) *Oakden v. Pike*, 11 Jur. N. S. 666.

(*y*) *Cutts v. Thodey*, 13 Sim. 206.

long time, as the bankruptcy or death of the purchaser, and the inability of his representatives to get in assets (z), and the omission to require payment of the deposit will not deprive him of his right to insist that the contract be rescinded, where he has taken other sufficient steps for that purpose (a).

Mala fides
repels
usual
rule.

(iv.) Although time may be made of the essence of the contract in reference to any matter appearing upon the abstract, as, for instance, in taking objections to the title, an exception from the ordinary rule will arise in such case, and time will not be considered essential for taking such objection, where there has been unfair dealing and a plain want of *bonâ fides* on the part of the vendor; as where the conditions were so framed as to deceive the purchaser, or throw him off his guard (b).

Time when
not
deemed
essential.

2. *Where time is not deemed an essential.*

The delay occasioning the objection will arise either from the conduct of the parties, or from the state of the title.

Where
delay
arises from
conduct
of parties
generally.

(1.) From the conduct of the parties.

(i.) The principal case shows the view taken by Courts of equity as to contracts generally; namely, that the general object being only the sale of an estate for a given sum, the particular day named is merely formal, and that the stipulation means in truth that the purchase shall be completed within a reasonable time, regard being had to all the circumstances of the case; and as in the case of mortgages, it acts on the general intention rather than on the particular words of the stipulation. The rule is, then, that it will grant the relief of specific performance, notwithstanding a failure to keep the dates assigned by the contract, if it can do justice to the parties, or if there is nothing in the stipulations between the parties, the nature of the property, or the surrounding circumstances

(z) *Mackreth v. Marlar*, 1 Cox, My. 236.
259.

(b) *Boyd v. Dickson*, 10 I. R. Eq.
(a) *Watson v. Reid*, 1 Russ. & 239.

which would make it inequitable to interfere with and modify the legal right. At law the vendor was bound to have his title deeds and abstract ready at the appointed time. In equity it is not solely incumbent upon the vendor to move by making a tender of the abstract, but it is also incumbent upon the purchaser to ask for it at the appointed day, or on such other day as will leave sufficient time for the completion of the contract. Otherwise the time would be considered as waived (*c*). So if the abstract were delivered after the appointed day, and the purchaser made no objection to the delay, he would be considered to have waived it (*d*).

If, however, the vendor does not deliver his abstract promptly, he of course cannot hold his purchaser to send in his objections in the time limited, even though it may have been stipulated that time in that respect should be of the essence of the contract (*e*).

(ii.) Equity, however, does not go so far as to enforce performance on a purchaser when the vendor has taken no steps whatever to complete the contract, and the purchaser has without delay insisted on his deposit and refused to proceed; nor would it have granted an injunction to restrain the purchaser from suing for his deposit at law (*f*). Unreasonable delay will of itself be a bar to either party obtaining a decree. "A party must show himself ready, desirous, prompt, and eager," in calling for the assistance of the Court (*g*), and a continual claim without any active steps in support of it will not keep alive a right which would otherwise be barred by *laches* (*h*).

This rule has been relaxed where a strict application of it would work injustice, as where after an agreement for a

(*c*) *Guest v. Homfray*, 5 Ves. 818;
Jones v. Price, 3 Anstr. 924.

(*d*) *Smith v. Burnam*, 2 Anstr.
527.

(*e*) *Upperton v. Nickolson*, 6 Ch.
436.

(*f*) *Lloyd v. Collett*, 4 Bro. C. C.
469.

(*g*) *Milward v. E. of Thanet*, 5
Ves. 720, n.

(*h*) *Lehmann v. McArthur*, 3 Eq.
746.

Excep-
tional
cases.

lease the intended lessee had entered into or remained in possession, and no further steps were taken to formally complete the contract until fourteen years had expired (*i*). But the fact that a purchaser has paid part of the purchase-money is not sufficient to entitle him to assistance, if he has lain by and delayed completion for an unreasonable time (*k*). Equity will not countenance parties in delaying matters with a view to see whether the contract will prove advantageous or not, and accordingly either to abandon it, or claim specific performance (*l*). Nor will a purchaser be aided who has taken trifling and vexatious objections to the title, and shown a disinclination to proceed (*m*), or is clearly unable to pay the purchase-money (*n*).

The granting or withholding of specific performance being discretionary, equity has sometimes refused to assist a party who is out of time on the general ground that the contract is inequitable, or the price unreasonable (*o*).

From the
nature of
the title.
General
rule.

(2.) From the nature of the title.

The general rule is that if a vendor commence an action for specific performance, he is entitled to assistance if he can procure a good title at the time of the decree. It is immaterial that he had not a title when entering into the articles for sale (*p*). It ought, however, generally to be made out in time for the certificate of the chief clerk, though this has not uniformly been insisted upon (*q*).

Where the objection to the vendor's title is that there is an interest outstanding in a third party, and the purchaser buys up that interest, he can no longer resist specific performance on the ground that it is not in the vendor (*r*).

(*i*) *Shepherd v. Walker*, 20 Eq. 659.

(*k*) *Harrington v. Wheeler*, 4 Ves. 686.

(*l*) *Alley v. Deschamps*, 13 Ves. 225.

(*m*) *Hayes v. Caryl*, 1 Bro. P. C. 126.

(*n*) *Gee v. Pearse*, 2 De G. & Sm.

325; *Aberaman Iron Works v. Wickens*, 5 Eq. 485.

(*o*) *Whorwood v. Simpson*, 2 Vern. 186.

(*p*) *Langford v. Pitt*, 2 P. Wms. 630.

(*q*) *Coffin v. Cooper*, 14 Ves. 205.

(*r*) *Murrell v. Goodyear*, 1 De G. F. & J. 432.

The tendency of decisions is now against the practice of compelling a purchaser to take an estate of which the title is not made out till after the time fixed by the contract, and the purchasers have been allowed the benefit of many slight circumstances in their favour ; for instance, that a new suit has become necessary, or that an account of debts remains to be taken in a suit, &c. (*r*).

3. *Compensation.*

In all cases in which specific performance has been decreed notwithstanding discrepancy in time or in substance of the contract, care has been taken that proper compensation should be made, and the parties in fact put in the same situation as if the contract had been strictly fulfilled.

Ordinarily a purchaser is entitled to the profits of the estate from the time at which the contract ought to have been completed (*s*); and the vendor is entitled to interest on the unpaid purchase money from the same time (*t*). But where the purchaser was in default of payment, under a contract by which the vendor was not bound to give up possession until payment, and the vendor, who occupied the property for the purpose of his business, continued the business on his own behalf under a pressure arising from the plaintiff's default, the vendor was adjudged to receive interest on his money, but not to pay an occupation rent for the premises from the time when the contract was made (*u*).

Where no time is fixed for completion, interest is usually payable by the purchaser from the time of taking possession (*x*).

In the case of sales by the order of the Court, if the estate be in possession, the purchaser will be entitled to

Tendency
of modern
decisions.

Compensa-
tion for
default in
time

how
calculated.

Interest.

Rents and
profits.

(*r*) *Lechmere v. Brasier*, 2 J. & W. 289; *Dalby v. Pullen*, 3 Sim. 29; *Fraser v. Wood*, 8 Beav. 339.

(*s*) *De Visme v. De V.*, 1 Mac. & G. 346.

(*t*) *Lowther v. U. of Andover*, 1

Bro. C. C. 396; *Calcraft v. Roebuck*, 1 Ves. 221

(*u*) *Leggatt v. Met. Ry. Co.*, 5 Ch. 716.

(*x*) *Birch v. Joy*, 3 H. L. 565.

Accessions.

the rents and profits from the quarter-day preceding his purchase, he paying his purchase money before the following one (*y*). If the estate be reversionary, the purchaser will be entitled to any benefit from the dropping of lives after the time of confirming the report absolute, and will consequently be liable to pay interest from that time (*z*).

Deteriorations.

If there has been delay in making out the title, and the property has deteriorated by dilapidations or mismanagement, compensation will be allowed to the purchaser (*a*), but not for deterioration after the time when he ought to have taken possession (*b*), and of course not for deterioration occasioned by himself (*c*).

Improvements.

Timber blown down after the contract will belong to the purchaser (*d*); and if common timber be felled after that time by the vendor, compensation must be paid to the purchaser (*e*). If the vendor, on the contrary, after the contract, lays out money in improvements, he cannot call upon the purchaser to repay it (*f*). In the absence of any express stipulation, the expenses and outgoings of property sold must be borne by the vendors, down to the time when the purchaser could prudently take possession, *i.e.*, when a good title can be shown (*g*).

Inquiry at chambers.

When time is of the essence of the contract, and the purchaser obtains a decree for specific performance, he will be entitled to compensation for the loss which he has sustained in consequence of possession not having been given to him according to the contract (*h*).

The general method of ascertaining the amount payable for compensation, is by directing an inquiry to that effect by the chief clerk in chambers.

(*y*) *Mackrell v. Hunt*, 2 Madd. 34, n.

(*z*) *Exp. Manning*, 2 P. Wms. 410; *Davy v. Barber*, 2 Atk. 489.

(*a*) *Foster v. Deacon*, 3 Madd. 394.

(*b*) *Binks v. Rokeby*, 2 Sw. 226.

(*c*) *Harford v. Purrier*, 1 Madd. 532.

(*d*) *Poole v. Shergold*, 2 Bro. C. C. 118.

(*e*) *Magennis v. Fallon*, 2 Moll. 591.

(*f*) *Monro v. Taylor*, 8 Ha. 60.

(*g*) *Carrodus v. Sharp*, 20 Beav. 56.

(*h*) *Gedge v. Montrose*, 26 Beav. 45.

II. *Where the Dispute relates to the Quantity or Quality of the Vendor's interest.*

The consideration of these cases naturally falls into two divisions, according as to whether the vendor or the purchaser is plaintiff; but it must be remembered that in all cases the condition on which these suits are entertained is that of compensation for the error or misdescription. It follows that the deficiency or difference alleged must be such as to admit of the proper compensation being adequately calculated. Accordingly relief will be refused where, from the nature of the property or the nature of the dispute the Court considers itself unable to fix or ascertain the amount proper to be allowed (*i*).

Disputes as to quantity and quality.

Compensation must be calculable.

1. *Where the vendor seeks specific performance.*

Vendors' suits generally.

At law, when a person contracted to sell a given interest, for instance a given term of years, and it turned out that the interest was less than was represented, the purchaser might recover the deposit and rescind the contract, notwithstanding that the vendor might offer compensation. But in equity, if the purchaser can get substantially what he contracted for, the vendor can enforce specific performance against him, allowing compensation for the difference in value. But the amount of variation which equity will recognise as admissible without destroying the contract, is of course a matter of degree. In general terms, the misdescription must not be substantial. The particular inquiry is, what is, and what is not considered substantial.

Difference must not be substantial.

(1.) The difference often relates to the tenure of land; and it is established that a purchaser cannot be required to accept land of a different tenure from that for which he bargained. Thus leaseholds, however long the term, or copyholds, cannot be substituted for freeholds (*k*), nor free-

Differences of tenure. What deemed substantial.

(*i*) *Re Bunbury's Estate*, 1 I. R. & G. 109.

Eq. 458; *Ridgway v. Gray*, 1 Mac. (k) *Drew v. Corp*, 9 Ves. 368.

hold for copyhold (*l*) ; though where the conditions of sale left the tenure doubtful or barred any objection on this ground, and the difference in value was slight, performance was enforced (*m*). Similarly a perpetual rent-charge will not sufficiently answer the description of a fee simple (*n*), nor can a purchaser be compelled to take an underlease instead of an original lease (*o*). And where the term of a leasehold turns out to be largely different from what was represented, the vendor will not be able to enforce his bargain, *e.g.*, where the contract was for a sixteen years' lease, and the term offered was only six (*p*). A purchaser of an entirety would not be obliged to take an undivided share of the estate (*q*), nor a remainder instead of an estate in possession (*r*), nor an estate subject to unusual easements (*s*), or to an undisclosed reservation of minerals (*t*).

What not. On the other hand, where there are undisclosed quit-rents, and rent-charges, at any rate if of small amount, they are considered fit subjects for compensation (*u*) ; and similarly, where there was a small error as to the term of a lease (*x*), or a mistake as to the amount of quit-rents sold (*y*).

Waiver by conduct of purchaser. Objections to the tenure may be waived by the conduct of the purchaser, as by his proceeding with the treaty after notice of the nature thereof, though by such waiver he does not lose his claim to compensation on performance (*z*).

Differences of quantity (2.) Another class of cases is where the misdescription relates to the quantity or the boundaries of the estate

(*l*) *Ayles v. Cox*, 16 Beav. 23.

(*m*) *Price v. Macaulay*, 2 De G. M. & G. 339.

(*n*) *Prendergast v. Eyre*, 2 Hogan, 81.

(*o*) *Madeley v. Booth*, 2 De G. & Sm. 718.

(*p*) *Long v. Fletcher*, 2 Eq. Ca. Ab. 5, pl. 4.

(*q*) *Att.-Gen. v. Day*, 1 Ves. 218.

(*r*) *Collier v. Jenkins*, You. 295.

(*s*) *Seaman v. Vandreg*, 16 Ves.

390.

(*t*) *Upperton v. Nickolson*, 6 Ch. 436.

(*u*) *Esdaile v. Stephenson*, 1 S. & S. 122; *Horniblow v. Shirley*, 13 Ves. 81.

(*x*) *Halsey v. Grant*, 13 Ves. 77.

(*y*) *Cuthbert v. Baker*, cited Sugd. V. & P. concise view, 219, ed. 1851.

(*z*) *Fordyce v. Ford*, 4 Bro. C. C. 494; *Calcraft v. Roebuck*, 1 Ves. jr. 221.

sold. Though the vendor fails to make a title to a small portion of the estate, if such portion is not material to the possession and enjoyment, specific performance with compensation will be decreed (*a*); but not if the portion is material, as where the contract is for a wharf and a jetty, and it turns out that the jetty is liable to be removed by the Corporation of London (*b*).

So also if a purchaser in the same contract agrees to purchase an estate for a fixed price, and also something else not essential to the enjoyment of the estate, but only a small adjunct of it, and a good title to this adjunct cannot be made, the sale of the estate alone will be enforced; for instance, a contract to buy an estate for £24,000 and the furniture thereon at a valuation (*c*). *Secus* if the adjunct is essential to the enjoyment of the property, as the fixtures of a public house (*d*).

In the case of an estate being sold by auction, after which it is found that a good title cannot be made to some of the lots, specific performance will be decreed, unless the lots as to which the failure occurs are complicated with the others (*e*): but everything depends in such a case upon the nature of the property; for instance, if a farm were sold along with a house for residence thereon, and the title to the house failed, the rest of the contract would scarcely be enforced.

Where lands are described as of or about a certain acreage, or of a certain acreage "be the same more or less," after actual conveyance to a purchaser he has no title to an abatement, though they should turn out considerably short of the figure named. But if he discovers the error before conveyance, unless it is of trifling extent, he may claim abatement (*f*). If, however, the vendor knew the

(*a*) *M'Queen v. Farquhar*, 11 Ves. 467.

(*b*) *Peers v. Lambert*, 7 Beav. 546; *Perkins v. Ede*, 16 Beav. 193.

(*c*) *Richardson v. Smith*, 5 Ch. 648.

(*d*) *Darbey v. Whitaker*, 4 Drew. 134.

(*e*) *Poole v. Shergold*, 2 Bro. C. C. 118.

(*f*) *Hill v. Buckley*, 17 Ves. 394; *Winch v. Winchester*, 1 V. & B. 375.

true quantity, the use of such phrases would not protect him from liability to compensate; nor would the purchaser's intimate acquaintance with the estate relieve the vendor (g).

If lands are purchased on the usual condition as to compensation for misdescription, and they prove to exceed the estimate, though the purchaser can enforce performance on paying compensation, the vendor cannot compel him to complete and pay a larger sum than he contracted to pay (h).

Purchasers' suits.
Purchaser can usually claim performance with abatement.

2. Where the purchaser seeks specific performance.

The general rule is that a purchaser may, if he chooses, compel a vendor who has contracted to sell a larger interest in an estate than he has, to convey to him such interest as he is entitled to, with compensation (i), and this, whether the difference is one of tenure or of quantity (k).

Exceptions.

Where, however, the title of the vendor is doubtful or defective, it has been held that the purchaser cannot compel a conveyance of such interest as he has (l); and the same was held where there was a difference of nearly one-half arising from the vendor's mistake between the representation and the fact (m).

Large error.

If the purchaser, at the time of the contract, knows of the limited interest of the vendor, he will not be able to insist upon a conveyance of such interest with compensation (n), and the neglect of a purchaser to make proper inquiries may disentitle him from claiming compensation for some defect which with ordinary care he might have discovered (o), as where a vendor has contracted to sell

Notice.

(g) <i>King v. Wilson</i> , 6 Beav. 124.	<i>McKenzie v. Hesketh</i> , 7 Ch. D. 675.
(h) <i>Price v. North</i> , 2 Y. & C. Ex. 620.	(l) <i>Williams v. Hygden</i> , 1 C. P. 509.
(i) <i>Mortlock v. Buller</i> , 10 Ves. 315.	(m) <i>Wheatley v. Stale</i> , 4 Sim. 126.
(k) <i>Hughes v. Jones</i> , 3 DeG. F. & J. 307; <i>Wood v. Griffith</i> , Wilson Ch. Rep. 44; <i>Leslie v. Crommclin</i> , 2 I. R. Eq. 134; <i>Hooper v. Smart</i> , 18 Eq. 683;	(n) <i>Lawrenson v. Butler</i> , 1 S. & L. 13; <i>Harnett v. Yeilding</i> , 2 S. & L. 549; <i>Cuttle v. Wilkinson</i> , 5 Ch. 534.
	(o) <i>Edwards-Wood v. Majoribanks</i> , 7 H. L. 806.

certain property which the purchaser knew to be in the occupation of a tenant, and it turned out that the tenant had an agreement for a lease (*p*), the occupation being considered to amount to constructive notice of the lease. But it appears that the doctrine of constructive notice is not generally applicable to such cases, and that at least it would not suffice in a vendor's suit (*q*), or in a purchaser's suit to give a title to compensation in respect of the tenant's interest (*r*).

Where, however, the statement as to quantity was simply a mistake, and it would be plainly unjust to the vendor to decree specific performance with compensation, the purchaser has been required to elect whether he would perform the contract without compensation, or have his bill dismissed (*s*); in this case there was a difference of nearly one-half in the acreage stated.

The right to compensation also may be excluded by express contract, as by a stipulation to that effect contained in the conditions of sale (*t*), unless such a condition may be construed so as to extend only to small accidental inaccuracies (*u*). The right, however, is not excluded by a mere condition that he shall not object to complete the purchase if the quantity should turn out less than was stated in the particulars (*x*); nor by acts on his part which merely amount to a waiver of objections to the title (*y*). It may be excluded by the vendor rescinding the contract under a condition empowering him to do so, if unwilling or unable to make a satisfactory title (*z*); but not if the vendor sold the property under such a condition knowing his title to be defective, or has been guilty of wilful misrepresentation (*a*); and notwithstanding such condition, if

(*p*) *James v. Lichfield*, 9 Eq. 51.

(*q*) *Caballero v. Henty*, 9 Ch. 447.

(*r*) *Phillips v. Miller*, 10 L. R. C. P. 428.

(*s*) *Earl of Durham v. Legard*, 34 L. J. Ch. N. S. 589.

(*t*) *Cordingley v. Cheeseborough*, 3 Giff. 496.

(*u*) *Whittencore v. W.*, 8 Eq. 603.

(*x*) *Frost v. Brewer*, 3 Jur. 165.

(*y*) *Calcraft v. Roebuck*, 1 Ves. jr. 221.

(*z*) *Mawson v. Fletcher*, 6 Ch. 91; 10 Eq. 213; *Duddell v. Simpson*, 2 Ch. 102.

(*a*) *Nelthorpe v. Holgate*, 1 Coll. 203; *Price v. Macaulay*, 2 De G. M. & G. 347.

Mistake purchaser's option to rescind.

Express stipulation to contrary.

the purchaser is willing to waive all objections to the title, he is entitled to take the property without compensation (*b*).

The right to rescind may, moreover, be lost by the vendor's replying to the purchaser's objections or requisitions (*c*), and by acquiescence in, or confirmation of the contract (*d*).

(*b*) *Page v. Adam*, 4 Beav. 269.

(*d*) *Cole v. Gibbons*, 3 P. Wms.

(*c*) *Tanner v. Smith*, 10 Sim. 410.

290; *Attwood v. Small*, 6 Cl. & F. 424.

CHAPTER VI.

INJUNCTIONS.

IN some respects analogous to the equitable remedy of Injunction specific performance, is the equally characteristic remedy ^{compared with} of injunction. A decree of specific performance, as its ^{specific} name implies, enforces the performance of some specific act. ^{performance.} An injunction is the very converse; it judicially forbids the performance of some specific act or series of acts.

From the nature of the case the remedy of specific performance only applies to cases arising out of contract; since it rarely happens apart from contract that one person has a right to the performance of a particular act on the part of another.

On the contrary, the cases for which injunction is a proper remedy have usually no connexion with contract. There are, indeed, cases in which one person contracts with another not to do a certain act; and such negative contracts may, as we have seen, be specifically enforced by means of injunction (*a*). But a great majority of the cases in which one person seeks to prohibit a certain act, depend on rights which avail against all the world; or to use the technical language of jurisprudence, depend on *jura in rem* not on *obligationes*. As far, however, as regards the remedy, there is little importance in the distinction. Whether the negative duty, or duty to abstain, be contractual or general, the injunction which enforces it is the same in nature and in form.

(a) P. 590. *Lumley v. Wagner*, 1 De G. M. & G. 615.

Definition. An injunction may be described as a judicial process whereby a party is required to do a particular thing or to refrain from doing a particular thing. There is, however, a marked contrast between injunctions which command and injunctions which forbid the doing of an act. The former only issue after decree, and are of the nature of an execution to enforce the same. The latter may be either interlocutory or perpetual. Interlocutory injunctions are made pending the hearing of the cause upon the merits, and are generally expressed to continue until such hearing or until further order. Perpetual injunctions are such as form part of the decree made at the hearing upon the merits, and perpetually restrain the defendant from the assertion of a right or the commission of some act contrary to equity : they are in fact final decrees.

Interlocutory or perpetual.

Interlocutory injunctions are merely provisional and do not conclude a right. Their object is to preserve the property subject to litigation *in statu quo* until the hearing or further order, and may be obtained by a plaintiff who shows that he has a fair question to raise as to the existence of the right which he alleges (*a*).

Mandatory injunctions.

Though a Court of equity has no jurisdiction in the absence of contract to compel the performance of a positive act, such as the removal of a work already executed, it may, by framing the order in an indirect form, compel a defendant to restore things to their former condition. Such orders are called mandatory injunctions (*b*). This jurisdiction is, however, only exercised in cases which admit of no other adequate remedy, and their occurrence is unfrequent. This species of relief will always be refused if the injury can be reasonably recompensed by damages, or even if the balance of convenience is strongly on the side of the defendant (*c*).

(*a*) See Kerr on Injunctions, pp. 11, 12, ed. 2.

(*b*) Kerr Inj. p. 50.

(*c*) *Deere v. Guest*, 1 My. & C. 516 ; *Jacomb v. Knight*, 3 De G. J. & S. 538.

The jurisdiction of equity to decree injunctions arose, like that of specific performance, from the want of an adequate remedy at law. The common law had, indeed, in certain cases, the power of prohibiting the committal of wrongs; for instance, waste could be restrained by the writ of prohibition and estrepment of waste. But the cases in which the common law supplied remedies of this nature were very few, and the procedure by which they were applied was cumbrous and inconvenient, so that the assistance of equity was at an early period found necessary for the proper administration of justice; and when this jurisdiction was established, the superiority of its process gradually caused the inferior remedies of law to fall into desuetude.

The following is in substance the enumeration given by a learned author of the circumstances in which the remedy of injunction has been most commonly applied (*d*). Origin of the jurisdiction.
Classification of injunctions.

1. To stay proceedings in Courts of law.
2. To restrain the indorsement or negotiation of negotiable instruments, the sale of land, the sailing of a ship, the transfer of stock or the alienation of a specific chattel.
3. To prevent the wasting of assets or other property pending litigation.
4. To restrain trustees from assigning or improperly dealing with the legal estate or trust property.
5. To prevent the removing out of the jurisdiction, marrying, or having any intercourse which the Court disapproves of, with a ward.
6. To restrain the commission of every species of waste.
7. To prevent the infringement of patents and the violation of copyright.
8. To prevent the continuance of public or private nuisances.
9. To prevent multiplicity of suits and vexatious litigation.

It will be observed that this enumeration admits of a

division into two strongly distinguished classes of cases ; first, those in which the wrong restrained is one which is regarded as such in equity only, and in which, accordingly, the ground of the jurisdiction is the absence of a legal remedy altogether ; secondly, those in which the wrong restrained is both legal and equitable, in which, therefore, the ground of the jurisdiction is the superiority of the equitable to the legal remedy.

Injunctions
against
equitable
wrongs.

The former class comprises,—first, injunctions which are designed to prevent the abuse of legal processes, under circumstances which render it inequitable to apply them ; secondly, injunctions protecting equitable estates and interests not recognised at law.

Injunctions
against
legal
wrongs.

The latter class includes,—first, injunctions protecting common rights as to the enjoyment of land ; secondly, injunctions protecting the peculiar rights arising from patents, copyright and the use of trade marks.

The enumeration above quoted does not indeed pretend to be exhaustive ; nor is it possible to specify every case to which the remedy of injunction might be applied. Wherever a plaintiff is equitably entitled *in rem* or *in personam* to restrain the commission or continuance of an act, he may be aided by means of injunction. The cases here given copiously illustrate the circumstances in which the remedy is most usually sought ; and whatever other cases may suggest themselves will be found to fall easily within one or other of the classes indicated.

SECTION I.—INJUNCTIONS RESTRAINING WRONGS PURELY
EQUITABLE.

I. *To prevent the abuse of Legal Processes.*

Earl of Oxford's Case.

II. *To protect Equitable Estates and Interests.*

I. *Injunctions to prevent the abuse of Legal Processes.*

The most important class of cases falling under this description is that on which one of the oldest, and most famous of authorities is—

THE EARL OF OXFORD'S CASE

[1 Ch. Rep. 1; 2 Wh. & T. L. C. 590].

This case is celebrated in history on account of the warm dispute which arose therefrom between Lord Chancellor Ellesmere, and Lord Chief Justice Coke. The former insisted on the right and jurisdiction of equity to restrain persons who had obtained judgments at law from making such judgments instruments of injustice. He did not pretend to a power to overrule the judgment, but merely to prevent the party obtaining it from acting upon it contrary to conscience. The latter, however, considered the exercise of this power as an encroachment upon the jurisdiction of the Courts of common law. So far did the contention go that indictments were preferred at Coke's instigation against the parties who had filed their bill in Chancery, their counsel and solicitors; and on the other hand, the Attorney-General was directed to prosecute in the Star Chamber those who had preferred the indictments.

In the event the jurisdiction of equity contended for was firmly established. And reasonably so, for it consisted not in any assumption of superiority to the Courts

of law, but in the assertion of a right to control the acts of the parties concerned, according to principles of conscience and equity.

The recent history of this head of equitable jurisdiction shows by what steps it has come to be at present of very small effect and importance, compared with what it formerly had.

C. L. P.
Act, 1854.

1. First, by the Common Law Procedure Act, 1854 (*e*), it was enacted (*f*) that equitable pleas and replications might be made use of at law. The effect of this might have been to have rendered the interference of equity on behalf of the defendant at law in the future unnecessary. But this effect was prevented by the narrow construction put upon the Act by the common law judges, who held that no equitable plea was good unless it disclosed facts which would entitle the defendant to a perpetual and unconditional injunction in equity (*g*). Thus in a multitude of cases, applications to the Court of Chancery continued to be necessary. Moreover, the Act only gave an option to the defendant at law to plead an equitable defence; it still left him the *power* of proceeding in equity for an injunction as before (*h*).

Jud. Acts.

2. By the Judicature Acts, 1873 and 1875 (*i*), the principal previously existing Courts of law and equity were consolidated into the Supreme Court of Judicature, consisting of Her Majesty's High Court of Justice and Her Majesty's Court of Appeal; and it was enacted that in every division thereof law and equity should be concurrently administered. Further, by section 24, sub-s. 5 of the Act of 1873, it is enacted that "no cause or proceeding at any time pending in the High Court of Justice or before the Court of Appeal shall be restrained by prohibition or injunction; but every matter of equity on which an injunction against the prosecution of any such

(*e*) 17 & 18 Vict. c. 125.

(*f*) Sect. 83.

(*g*) *Jeffs v. Day*, L. R. 1 Q. B. 374.

(*h*) *Gompertz v. Pooley*, 4 Drew,

453.

(*i*) 36 & 37 Vict. c. 66, and 38 & 39 Vict. c. 77.

cause or proceeding might have been obtained if this Act had not passed, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto: Provided always, that nothing in this Act contained shall disable either of the said Courts from directing a stay of proceedings in any cause or matter pending before it if it shall think fit; and any person, whether a party or not to any such cause or matter, who would have been entitled if this Act had not passed, to apply to any Court to restrain the prosecution thereof, or who may be entitled to enforce by attachment or otherwise any judgment, decree, rule, or order contrary to which all or any part of the proceedings in such cause or matter may have been taken, shall be at liberty to apply to the said Courts respectively, by motion in a summary way, for a stay of proceedings in such cause or matter, either generally, or so far as may be necessary for the purposes of justice; and the Court shall thereupon make such order as shall be just."

The result of this legislation is to put a stop in general to injunctions against judicial proceedings; providing instead thereof a power for any division of the High Court to order a stay of its own proceedings, and in applications for this purpose to consider and give weight to those principles of equity which were previously invoked for the purpose of obtaining an injunction.

3. Still, there are cases not affected by the Judicature Act in which this equitable procedure may be accordingly appealed to; and it is therefore not idle to consider the principles by which it was and may be still directed.

In the first place, it is to be observed that the old jurisdiction remains in force as regards proceedings in all Courts not comprised by the Judicature Acts in the High Court of Justice.

Thus the Chancery Division may restrain a person within its jurisdiction from taking proceedings in Courts out of its jurisdiction—for instance, in Scotland, Ireland, the colonies, or in foreign countries. But no more in these

Effect of
legislation.

Cases not
within the
Acts.

Suits in
foreign
Courts
restrained.

cases than formerly in granting injunctions against proceedings in the ordinary Courts of law does equity affect to control, or overrule, or examine the judicial or administrative action of the foreign tribunals. It addresses its decree to the person within its jurisdiction, forbidding his action (*k*).

And in English Courts not affected by the Acts.

Again, there are certain Courts in England which were not affected by the Judicature Act, and which, therefore, continue to be ruled by the old principles and procedure. One instance of this is the Lord Mayor's Court in London; and if from any circumstances it were inequitable that a person should take or continue proceedings therein, there seems no reason why he should not as formerly be restrained by a Court of equity (*l*). Other local Courts in England fall within the same principle.

Court of Bankruptcy.

4. Conversely with these cases, the Court of Bankruptcy, which is not affected by the Judicature Act, retains its former power of restraining actions in other Courts under the circumstances coming under its special cognisance (*m*).

In what circumstances granted.

5. There being, therefore, cases in which injunctions against legal proceedings may still be sought in equity, it is not immaterial to inquire into the circumstances which will be deemed to warrant such application; especially since in cases in which an injunction is no longer the proper remedy, the same circumstances which formerly warranted it will now entitle a defendant to a stay of proceedings.

Lord Ellesmere in the principal case gave certain illustrations of the circumstances in which the Court had interfered to stay proceedings at law, on the grounds of some equity of which the defendant could not avail himself in a Court of law, but to which he might appeal as a suppliant in Chancery. The following heads have been specified as comprising the various grounds on which such interference of equity might be sought:—accident,

(*k*) *Portarlington v. Soulby*, 3 My. & K. 106; *Hoje v. Carnegie*, 1 Ch. 320

(*l*) *Mildred v. Neate*, 1 Dick. 279; *Cottesworth v. Stephens*, 4 Ha. 185.

(*m*) *Eag. Ditton*, 1 Ch. D. 557.

mistake, fraud, accounts, illegal and immoral contracts, penalties and forfeitures, breaches of covenants, administration of assets, marshalling of securities and suretyship (*n*). The distinction between equitable and legal doctrines and practice as to these matters have already been expounded under the various headings of this work, and of course need not now be particularly referred to. It suffices to adduce a few illustrations of the operation of the jurisdiction in the cases in which it still applies, at the same time contrasting it with the procedure by which in other cases the same result is now reached.

First, however, we may premise that it was always necessary for a plaintiff seeking an injunction against legal proceedings to establish some special *equitable* title to relief—the remedy was not given on the ground of matter which might be alleged in defence at law (*o*); and thus the amendment of the law effected by the Common Law Procedure Act, 1854, already quoted, reduced the number of cases in which the remedy of injunction was available (*p*). Moreover, the principle of injunctions cannot be so applied as to amount in effect to an appeal from a Court of law. An injunction will never be granted against the execution of a judgment on the mere ground of its being a decision erroneous at law (*q*). Still less where the result has been produced by the negligence of the party seeking relief (*r*). The illustrations adduced will show the nature of the special equitable claims which form proper grounds for seeking the remedy.

Equitable
title re-
quired.

Mere error
at law not
sufficient.

6. Perhaps there is no class of actions in which the remedy of injunction has been so frequently applied as in those of creditors against the legal personal representatives of deceased persons.

In some of such cases the injunction is sought and Execu-

(*n*) Eden on Injunctions, 4; Joyce on Injunctions, 1053, 1257.

(*o*) *Harrison v. Nettleship*, 2 My. & K. 423.

(*p*) *Farebrother v. Welchman*, 3

Drew, 122, and cf. *Gompertz v. Pooley*, 4 Drew, 453.

(*q*) *Simpson v. Howden*, 3 My. & Cr. 108.

(*r*) *Bateman v. Willoe*, 1 S. & L. 204

tors and
adminis-
trators
protected.

granted for the protection of the executor or administrator. At law, when the legal personal representative had once acquired possession of or become chargeable with sufficient property of the deceased to discharge his debts, he remained chargeable, notwithstanding any accident, such as robbery or fire, which might destroy the property before its distribution; and it mattered not how free from default he may have been, or how great the liability thus devolving upon him personally. But in equity the hardship and injustice of a creditor's action under such circumstances was recognised, and on the application of the executor or administrator, a Court of equity would issue an injunction forbidding the creditor to continue his proceedings at law (s).

Stay of
proceed-
ings.

Under the present practice, the Courts of law would themselves stay proceedings under these circumstances, or else direct a verdict for the defendant at the trial (t).

General
creditors
protected.

7. In another class of cases an injunction was obtainable for the protection of the general creditors. We have elsewhere seen that executors had at law large powers of preference with regard to the payment of the debts of their testator. To prevent the unfair exercise of this preference, Courts of equity encouraged suits for the general administration of estates, in which their decrees differed from a judgment at law in that they were equally in favour of all creditors. After the granting of such a decree, equity was wont to restrain all actions brought by individual creditors at law (u).

Present
practice.

Under the present practice, a Court of law would stay proceedings in such an action (x), and the Judge in whose Court the administration action is pending has power, without any further consent, to order the transfer to himself of any action pending in any other division of the Court

(s) *Crosse v. Smith*, 7 East, 258; t. Talb. 217; 4 Bro. P. C. 287; *Rush Croft v. Lyndsey*, Freem. 1. v. *Higgs*, 4 Ves. 638.

(t) *Job v. J.*, 6 Ch. D. 562.

(x) *Crowle v. Russell*, 4 C. P. D. 186.

(u) *Morrice v. B. of England*, Ca.

brought by or against the executors or administrators whose assets are being administered (*y*).

Similar to these cases were those in which actions at law were commenced against a company after proceedings had been taken in equity for its winding-up. These cases are now also provided for by the rule of Court above referred to. Injunctions in winding-up.

8. Other illustrations of the granting of similar injunctions are afforded by cases in which instruments legally binding have been obtained by such actual or constructive fraud as confers an equitable title to relief against them. Such matters can now, of course, be pleaded in defence in any division of the Court; formerly the relief took the form of an injunction restraining legal proceedings on the instrument (*z*). Equitable defences against legal instruments.

9. Where, again, the legal and equitable titles to property were in different people, an action at law by the person having the legal estate was restrained by injunction. Thus separate estate limited to a married woman without the intervention of trustees, was protected against the judgment creditors of her husband by this means. The creditors, indeed, obtained a legal title through the husband; but he being in equity a trustee, their execution was restrained by injunction (*a*). Trust estates protected.

10. The desire to avoid multiplicity of actions was also a frequent ground of injunctions to stay proceedings. A party was never suffered to sue for the same thing at the same time in equity and at law. When litigation was pending in one Court in which complete relief could be had, and it was sought to institute proceedings elsewhere, the person so attempting was restrained by injunction (*b*); *a fortiori* if the design of the foreign proceedings was to gain some unfair advantage, as where a creditor who had a Injunctions against multiplicity of actions.

(*y*) Order LI., rule 2a, June, 1876.

& Cr. 408.

(*z*) *Lloyd v. Clark*, 6 Beav. 309;
Tyler v. Yates, 11 Eq. 265.

(*b*) *Carron &c. Co. v. MacLaren*,
5 H. L. 416, 437; *Harrison v. Gur-*
ney, 2 J. & W. 563.

(*a*) *Newlands v. Pagiter*, 4 My.

specific charge upon a part of the testator's real estate came in under a decree in a general administration suit, and then claimed to prove in a creditors' suit which he had instituted in Ireland (*c*).

Conflicting
suits at
law and in
equity.

Formerly, where there were conflicting suits in equity and at law, the party was put to his election to carry on one or the other (*d*). Now, such suits would probably, by means of a transfer to the same Court, be heard together. As regards suits in foreign Courts, the law seemingly remains on the same footing as before.

Foreign
suits, when
restrained.

11. In the case of foreign suits, even though no decree has been obtained in this country, yet if a suit instituted abroad appears ill-calculated to answer the ends of justice, it may be restrained (*e*). And where there has been no question as to the necessity of the foreign litigation, a person within the jurisdiction of the Court of Chancery has been restrained from proceedings which are deemed by it contrary to good conscience, such as a suit to recover a gambling debt (*f*).

The fact of a foreigner having property in this country enables the Court to make effectual an injunction issued against him (*g*).

On the contrary, where such interposition would not tend to equality of all parties, or where it would not add to the convenience of proceeding, it will not be granted (*h*).

When a foreigner seeks no assistance from the Courts of this country, it requires a very strong case to induce them to restrain him, when domiciled in another country, from proceeding to obtain payment of his debts according to the law of that country (*i*).

Applica-

12. Analogous in principle to the restraining of proceed-

(*c*) *Beauchamp v. Huntley*, Jac. 546.

(*d*) *Vaughan v. Welsh*, Moss, 210.

(*e*) *Baillie v. B.*, 5 Eq. 175.

(*f*) *Portarlington v. Soulby*, 3 My. & K. 104; *Simpson v. Fojo*, 1 J. & H. 18; 1 H. & M. 195.

(*g*) *Carron &c. Co. v. Maclaren*, 5 H. L. 416.

(*h*) *Liverpool &c. Co. v. Hunter*, 4 Eq. 62; 3 Ch. 479; *Jones v. Geddes*, 1 Ph. 725.

(*i*) *Carron &c. Co. v. Maclaren*, *sup.*

ings in Courts of justice are those in which application has been made to the Court of Chancery against a party applying for a private Act of Parliament, or for an Act respecting property. It has been laid down by many judges that the Court, acting *in personam*, has power to grant such an injunction, though there is no case in which it has been actually carried into effect. In *Heathcote v. N. S. R. Co.* (k) an injunction was granted by Sir L. Shadwell, but was dissolved by Lord Cottenham on appeal, not indeed on the general ground of want of jurisdiction, but from the absence in that case of circumstances warranting such a decree. His lordship pointed out an important distinction between such a case and an injunction against proceedings at law, the ground of the latter being that it was sought to interfere with an inequitable use of a legal right, while in the former case, it was the ordinary province of the legislature to abrogate existing rights and create new ones. To hold, therefore, that no application should be made to Parliament because its object was to interfere with some right or interest, would be in effect to hold that the Court should by its injunction deprive the subject of the benefit of parliamentary interference. An injunction, therefore, could not be granted on the ground that the Act of Parliament sought for would interfere with existing rights, it being the very object of it to do so.

Upon the same principle, in the absence of some special equity, the Court will not restrain an application to the legislature of a foreign country (l).

As, however, it is unlawful, and in fact a breach of trust, to apply the funds of a company in an application to Parliament for powers to extend the business of the company beyond the objects for which it was constituted, the Court has power, at the suit of any of the shareholders, to interfere by injunction to restrain such application (m). The funds of

(k) 2 Mac. & G. 100.

(l) *Bill v. Sierra de. Co.*, 1 De G. F. & J. 177.

(m) *Simpson v. Denison*, 10 Ha. 51; see also *G. W. R. Co. v. Rushout*, 5 De G. & Sm. 290.

a company may, however, be employed in defence of existing rights, and if it be necessary to apply to Parliament for their protection, such application will not be restrained (*n*).

Equity
protects
its own
officers.

13. Courts of equity have always been careful to protect their own officers in the execution of the processes of the Court against any actions brought against them for acts done in pursuance of their duty. If the processes were irregular, they were not to be examined in other Courts; the Courts of equity would themselves apply the proper remedy (*o*).

Criminal
proceed-
ings not
restrained.

14. It may be laid down as a general principle, that a Court of equity neither has nor had any jurisdiction to restrain by injunction any criminal proceedings (*p*). It was but an apparent exception that when the person instituting such proceedings was at the same time himself a plaintiff in equity, the Court had power to require him to elect between his suit in equity and his prosecution (*q*); and this case has recently been disapproved of by high authority (*r*).

II. *Injunctions protecting Equitable Estates and Interests not recognised at Law.*

Trust
property
protected.

1. Trusts supply the most extensive and important class of purely equitable estates. An illustration which falls with equal propriety under this head has been already given of the protection of trust property by means of injunction (*s*). Other instances of a similar nature may be easily supplied; for example, where a trustee seeks payment to himself of a legacy bequeathed to his *cestui*

(*n*) *Bright v. North*, 2 Ph. 216.

(*o*) *May v. Hook*, 2 Dick. 619, cited; *Walker v. Micklethwait*, 1 Dr. & Sm. 49.

(*p*) *Montague v. Dodman*, 2 Ves. sr. 396.

(*q*) *M. of York v. Pilkington*, 2 Atk. 302.

(*r*) *Saull v. Browne*, 10 Ch. 64; *Kerr v. Corp. of Preston*, 6 Ch. D. 463.

(*s*) *Newlands v. Paynter*, 4 My. & Cr. 408.

que trust (t). So where a *cestui que trust* proves a probable intention on the part of his trustee to commit a breach of trust, he may procure an injunction to restrain him (u); and it is not necessary to entitle him to this relief that the threatened damage should be irreparable (v). It is the right and duty of a trustee who apprehends a breach of trust by his co-trustee to seek an injunction to restrain him (x).

2. Thus again, the lien of a purchaser has been protected by an injunction restraining the vendor from parting with the legal estate (y). Constructive trusts arising from frauds have also been assisted by restraining the indorsement or negotiation of notes fraudulently obtained (z).

3. We have seen elsewhere (p. 394) that the unauthorised marriage or removal of wards of Court will be prohibited by injunction; a guardian may even be restrained from giving his consent to such a marriage without the leave of the Court (a); and by an analogous jurisdiction, fathers have for special reasons been restrained from taking their children abroad, or interfering with their education (b).

(t) *Hill v. Turner*, 1 Atk. 516.

(u) *Balls v. Strutt*, 1 Ha. 146.

(v) *Anon.*, 6 Mad. 10; *Dance v. Goldingham*, 8 Ch. 902.

(x) *Re Chertsey Market*, 6 Pri. 279.

(y) *Echliß v. Baldwin*, 16 Ves. 267.

(z) *Smith v. Aykwell*, 3 Atk. 566.

(a) *Beard v. Travers*, 1 Ves. 313.

(b) *Exp. Warner*, 4 Bro. C. C. 101; *De Manneville v. De M.*, 10 Ves. 52.

Breach of
trust re-
strained.

Liens
protected.

Construc-
tive trusts.

Improper
dealing
with wards
of Court.

SECTION II.—INJUNCTIONS RESTRAINING WRONGS AT ONCE LEGAL AND EQUITABLE.

GENERAL PRINCIPLES.

I. *Injunctions protecting Rights in Land.*

1. *Waste.*

(1.) *Doctrines and remedies of law as to waste.*

(2.) *Doctrines and remedies of equity as to waste.*

Garth *v.* Cotton.

2. *Trespass.*

3. *Nuisances.*

II. *Injunctions protecting Patent Rights, &c.*

1. *Patents.*

Hill *v.* Thompson.

2. *Copyright.*

3. *Trade marks.*

Principles
of the
jurisdic-
tion.

The protection of legal rights to property from irreparable, or at least from serious damage, pending the trial of the legal right, is part of the original and proper office of a Court of equity (*c*). It has sometimes been quoted as a maxim that equity will not suffer a wrong without a remedy. A full discussion, therefore, of the cases in which the protection of an injunction might be afforded would require an exposition of legal rights generally, which cannot, of course, be here attempted. It must suffice, first, to indicate the general principles by which the exercise of the jurisdiction is directed, and secondly, to pass in review, by way of illustration, some of the most frequently occurring and important cases in which this particular remedy is applied.

(*c*) Kerr Inj. 13 ; *Hilton v. Grancville*, Cr. & Ph. 283, 292.

(1.) A plaintiff seeking in equity an injunction for the protection of a legal right, must first show a fair *prima facie* case in support of the title which he asserts (*d*). Plaintiff must show *prima facie* right, It is not necessary for him to show a clear legal title, but he must satisfy the Court that he has a fair question to raise as to the existence of the legal right which he sets up (*e*).

(2.) He must also show that there are substantial grounds for doubting the existence of the right asserted by the defendant whom he seeks to restrain (*f*); or, if his legal right is not disputed, he must show that the act complained of is in fact a violation of his right (*g*), and that there is a real probability or danger of his right being invaded. On the one hand, the mere apprehension of injury is not sufficient (*h*); on the other, the mere denial by the defendant of his intention to infringe the plaintiff's right will not necessarily prevent the Court from interfering (*i*). It suffices if the Court is satisfied that an infringement is threatened or is imminent (*k*). and that defendant's right is doubtful, or his act is injurious,

(3.) Thirdly, the plaintiff must show that the mischief which he seeks to restrain will be such as to be incapable of reparation by any legal remedy. It must be such as that a mere payment of damages will not suffice to put the parties in their original position (*l*). This may be the case either because the act threatened would destroy the subject-matter of dispute (*m*), or because the nature of the act renders it impossible to accurately ascertain the damage (*n*). and that the legal remedy is insufficient.

On these general conditions rests the jurisdiction to grant an injunction for the protection of a legal right. The detailed considerations which affect it will best be seen

(*d*) *Ibid.*; *Saunders v. Smith*, 3 My. & Cr. 714, 728.

(*e*) *Shrewsbury & Chester R. Co. v. Shrewsbury & Birmingham R. Co.*, 1 Sim. N. S. 410, 426.

(*f*) *Sparrow v. O. W. & W. R. Co.*, 9 Ha. 436, 441.

(*g*) *Ripon v. Hobart*, 3 My. & K. 169, 176; *Haines v. Taylor*, 10 Beav. 471; 2 Ph. 209.

(*h*) *Hanson v. Gardiner*, 7 Ves. 307.

(*i*) *Jackson v. Cator*, 5 Ves. 688.

(*k*) *Gibson v. Smith*, 2 Atk. 182.

(*l*) *Wood v. Sutcliffe*, 2 Sim. N. S. 165.

(*m*) *Hilton v. Granville*, Cr. & Ph. 283, 292.

(*n*) *Att.-Gen. v. Aspinall*, 2 My. & Cr. 613.

under the headings which particularly illustrate its application. These fall under one or other of two classes, of which the first comprises common law rights respecting the enjoyment of land or houses; the second, the somewhat peculiar class of rights which arise from patents, copyright, and the use of trade marks.

I. *Injunctions protecting Rights in Land.*

1. *Injunctions against waste.*

Some of the most important cases in which equity assists the law by applying its special processes for the protection of legal rights are supplied by questions respecting waste. There are indeed cases of waste in which the wrong redressed is simply equitable, and which would, therefore, more strictly fall under the preceding heading. But it will be more convenient to treat together the various matters concerning waste which call for comment; and in doing so, the distinctions between legal and equitable waste will be plainly indicated. The principles of equity respecting waste will most clearly appear if we first review those of law on the same subject.

(1.) *The doctrines and remedies of law as to waste.*

Definition. Waste at law has been defined as "any spoil or destruction done, or allowed to be done, to houses, woods, lands, or other corporeal hereditaments by the tenant thereof, during the continuance of his particular estate" (o).

(a.) *Against whom chargeable.*

Tenant for life. Waste, as distinguished from trespass, could only be committed by a limited owner, that is, a tenant for life, or for years, in dower or in curtesy, and it could only be charged against him by one between whom and himself there was privity of estate.

Rector or vicar. A rector or vicar is in the same position as an ordinary

tenant for life, and has no right to fell timber except for necessary repairs to the premises (*p*).

A tenant in tail after possibility of issue extinct, although practically a tenant for life, was not within the legal restrictions as to waste; he was regarded as having an inheritance (*q*); but a person to whom he conveyed his estate was treated as only tenant for life (*r*).

Tenant in tail not liable.

These legal restrictions from waste have no application when the instrument giving rise to the life or limited tenancy contains with respect thereto the common clause "without impeachment of waste," or its equivalent. Then, he may fell timber, or open quarries or mines, and will be entitled to the full produce (*s*). In the presence of these words, the Courts of law possessed no restraining power, and had no further jurisdiction.

Legal waste allowed.

(b.) *What acts amount to waste at law.*

i. Timber trees (oak, ash, and elm) being part of the inheritance, it is waste to fell or lop them, or do any act whereby they might decay. A tenant is allowed to cut down trees under twenty years old for the purpose of allowing the proper development and growth of other timber in the same wood and plantation; that is improvement rather than waste (*t*). The tenant for life of a timber estate, *i.e.*, an estate cultivated merely for the produce of saleable timber, and where timber is cut periodically, may fell it in the ordinary course. To do so is a mode of cultivation, and timber felled in proper course constitutes the annual fruit of such land, such as the settlor of the land would expect the successive tenants to receive. He may also cut underwood and willows in due course (*u*), and all trees other than timber trees (*x*).

Felling timber.

ii. Such a tenant would, moreover, commit waste by Opening

(*p*) *D. of Marlborough v. St. John*, 5 De G. & Sm. 174.

(*q*) *Williams v. W.*, 15 Ves. 419.

(*r*) *George Ap-Rice's Case*, 3 Leon. 241.

(*s*) *Lewis Bowles' Case*, 11 Rep. 83.

(*t*) *Honywood v. H.*, 18 Eq. 310; *Lowndes v. Norton*, 6 Ch. D. 139.

(*u*) *Hampton v. Hodges*, 8 Ves. 105; *Phillips v. Smith*, 14 M. & W. 589.

(*x*) *Honywood v. H.*, *sup.*

new pits or mines. digging pits for gravel, lime, clay, stone, &c. (except for repairs), or by opening new mines for metal, coal, &c. (y); but he may continue working pits and mines previously opened, and in order to do so may make new pits or shafts (z).

(c.) *Remedies at law.*

Writ of waste.

The remedies for waste at law were by writ of waste (abolished by 3 & 4 Will. 4, c. 27, s. 36), by an action for damages, by trover for trees, &c., which became the property of the next owner of the inheritance as soon as they were felled, or by action for money had and received for the produce of their sale (a).

Inadequacy of the remedy.

The incompleteness or inadequacy of these remedies is very apparent. They only contemplate the recovery of damages after the waste has been committed, and previous to 17 & 18 Vict. c. 125, Courts of law had no power to prevent by injunction the commission of the waste. Again, Courts of law had no efficient machinery for the taking of accounts, which were often long and complicated. Further, they supplied no remedy at all for many cases of legal waste, as will be more fully seen when considering the nature of the equitable jurisdiction. And lastly, they took no cognisance whatever of what is termed equitable waste.

Of course the contrast thus suggested between law and equity is now a matter of history. By the Judicature Act, 1873 (b), it is enacted that, "An estate for life without impeachment of waste shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate." Though tenants for years and tenants in tail after possibility of

(y) Co. Litt. 53 b.; *Viner v. Faughan*, 2 Beav. 466.

(a) *Seagram v. Knight*, 2 Ch. 632.

(z) *Clavering v. C.*, 2 P. Wms. 388; *Elias v. Griffith*, 8 Ch. D. 521.

(b) 36 & 37 Vict. c. 66, s. 25, sub-s. 3.

issue extinct are not here mentioned, they are brought within the same rule by sub-s. 11, which enacts that in case of a conflict between law and equity the rules of equity shall prevail.

(2.) *The doctrines and remedies of equity as to waste.*

The contrast between the doctrines of equity and those of law with respect to waste is twofold. In the first place, it consists in the more extended meaning which equity ascribes to the word, reckoning, as it does, many acts as waste which the law did not consider chargeable. Secondly, equity affords a remedy to many persons to whom law would not have allowed a *locus standi*. Its jurisdiction, therefore, in cases of waste depends partly upon the nature of the act complained of, partly upon the position of the parties.

(a.) *As to the nature of the act charged.*

The consideration of the jurisdiction which particularly depends on the nature of the waste complained of requires a definition of equitable waste.

Though equity follows the law in allowing weight to the words "without impeachment of waste," or their equivalent, when used respecting a limited tenancy, it does so only to a certain degree. When they are used it will not restrain from the committing of ordinary waste, such as cutting timber trees and opening mines; but it will not allow this power to be exercised contrary to conscience and in an unreasonable manner, so as to amount in fact to a destruction of the estate settled (c).

The following acts of waste, with which in tenancies "without impeachment of waste" the law would not have interfered, have been deemed unconscionable and unreasonable in equity, and constitute, therefore, equitable waste:—

i. The destruction or dismantling of the mansion house (d), and the wanton pulling down of farmhouses

(c) *Vane v. Barnard*, 2 Vern.

(d) *Lord Barnard's Case*, 2 Vern.

Contrast of
law and
equity.

Equitable
waste
defined.

Instances
of equitable waste.

Destroying
mansion
house.

on the property (*e*). If, however, such destruction has been simply for the purpose of erecting houses of a better kind or in more favourable situations, the tenant incurs no liability to account (*f*).

Stripping
estate of
timber.

ii. Though equity allows the ordinary and reasonable cutting of timber, it will interfere if a tenant threatens to strip the estate thereof, or to grub up a wood settled, or make any such extravagant misuse of the power (*g*).

Felling or-
namental
timber.

iii. Similarly, it will not allow the felling of timber planted or left standing for the shelter or ornament of a mansion house or grounds (*h*), even if planted by the tenant himself (*i*). In applying this restriction equity will not criticise the designs of the settlor: his taste as well as his will binds his successors (*k*). The principle extends also to ornaments of outhouses and grounds, plantations, vistas, avenues, and to all the rides for ten miles round (*l*); but not necessarily so as to prevent the cutting for repairs of woods through which such rides pass (*m*).

When or-
namental
timber
may be
felled.

Circumstances, however, may justify the felling of ornamental timber; for instance, if a storm, by blowing down some trees, renders the removal of others desirable to restore symmetry (*n*); or if some trees are impeding the growth of others of greater importance (*o*), or are from their proximity to the house prejudicial or dangerous thereto (*p*). In these cases, however, the burden of proof is on the parties alleging the necessity (*q*).

The protection of ornamental timber being ascribable to its connexion with the mansion-house or grounds, a question has arisen as to whether such protection should

(*e*) *Aston v. A.*, 1 Ves. sr. 265.

6 Ves. 110.

(*f*) *Morris v. M.*, 3 De G. & J.

(*l*) *Ibid.*

323.

(*m*) *Ibid.*

(*g*) *Talbot v. Hope-Scott*, 4 K. & J. 96; *Abraham v. Bubb*, 2 Freem.

(*n*) *Mahon v. Stanhope*, 3 Madd. 523, n.

54.

(*o*) *Lushington v. Boldero*, 6 Madd.

(*h*) *Rolt v. Somerville*, 2 Eq. Ca. Ab. 759.

149.

(*i*) *Coffin v. C.*, Jac. 71.

(*p*) *Campbell v. Allgood*, 17 Beav. 623.

(*k*) *M. of Downshire v. Sandys*,

(*q*) *Ibid.*

be continued after the mansion house has been pulled down. The distinction has been drawn that if the house has been pulled down by the owner in fee without any intention of rebuilding it, the timber which was formerly ornamental ceases to be so, and may be cut down (*r*); but if it is proved or may be inferred that the intention was to rebuild the house, or that any devisee under his will should do so, the trees should still be protected (*s*). But in an important case, destruction of such timber was restrained notwithstanding the unqualified destruction of the mansion house (*t*).

iv. The Court will prevent the cutting of saplings not proper to be felled (*u*), and of underwood before it is of sufficient growth (*x*), but not the felling of timber merely because it is not full grown or proper for building (*y*). Cutting saplings.

v. Analogous to the wanton destruction of timber is the improvident or destructive working of mines, from which a tenant for life may be restrained, though not impeachable for waste. Improvident mining.

vi. It is now settled that the Court will not usually interfere to prevent or remedy permissive waste, that is to say, waste occasioned not by act, but by omission, as by suffering houses to fall into decay for want of repairs (*z*); but an account would be directed where there was an express covenant to repair (*a*). There seems, however, to have been a legal liability for such waste (*b*). Permissive waste.

(*b*.) *By and against whom waste may be charged.*

The next inquiry is as to those cases in which the jurisdiction of equity arises from the position of the parties concerned being such as to leave no remedy at law.

i. A tenant in tail after possibility of issue extinct, although Tenant in

(*r*) *Micklethwait v. M.*, 1 De G. & J. 504. 279.

(*s*) *Ibid.*, 519.

(*t*) *Wellesley v. W.*, 6 Sim. 497 ; see also *Morris v. M.*, 15 Sim. 505 ; 11 Jur. 196.

(*u*) *O'Brien v. O'B.*, Amb. 107.

(*x*) *Brydges v. Stevens*, 6 Madd.

(*y*) *Aston v. A.*, 1 Ves. sr. 264.

(*z*) *Powys v. Blagrove*, Kay, 495 ; 4 De G. M. & G. 448.

(*a*) *Marsh v. Wells*, 2 S. & S. 87.

(*b*) *Greene v. Cole*, 2 Wms. Saund. 252 and notes ; *Woodhouse v. Walker*, 5 Q. B. D. 404.

tail after possibility of issue extinct.

Tenant in tail not accountable generally.

Mortgagee in possession.

Mortgagor.

Tenant for life, remainder for life.

unimpeachable of waste at law, is within the principle of equitable waste, and will be restrained in equity from committing malicious and extravagant waste, such as pulling down houses, and the other acts above mentioned (*c*). But equity will not, any more than law, interfere with an ordinary tenant in tail, who may at his unrestrained pleasure commit any degree of waste, and this notwithstanding that he is restrained by statute from barring his issue or those in remainder, with reversion to the Crown (*d*).

ii. A mortgagee in fee in possession may at present be restrained from committing waste, as by cutting timber, unless the security be insufficient; and if so, the money arising by sale of the timber or otherwise from the waste must be applied to sink the principal and interest of the debt (*e*).

But as regards mortgages executed after Dec. 31st, 1881, it has now been enacted that a mortgagee in possession shall have power to cut and sell timber and other trees ripe for cutting, and not planted or left standing for shelter or ornament, or to contract for any such cutting and sale, unless a contrary intention is expressed in the mortgage deed (*f*).

On the other hand, a mortgagor in possession will be restrained from waste at the suit of the mortgagee, on his showing that the security would be thereby rendered insufficient or scanty (*g*).

iii. The most important of the cases under this heading are those which are illustrated by the leading authority of

GARTH v. COTTON

[1 Ves. sr. 524, 546; 1 Dick. 183; 1 W. & T. L. C. 751].

In its simplest form it is as follows: An estate is limited to a tenant for life, remainder to another for life, with remainder over in fee or in tail. Here the remainderman for life could not sue for waste at law, because he has not

(*c*) *Att.-Gen. v. D. of Marlborough*, 3 Madd. 538.

(*d*) *Ibid.*, 498, 536, 539.

(*e*) *Farrant v. Lovel*, 3 Atk. 723.

(*f*) 44 & 45 Vict. c. 41, s. 19.

(*g*) *Humphreys v. Harrison*, 1 J. & W. 581; *King v. Smith*, 2 Ha. 239.

the inheritance ; and the remainderman in fee or tail could not sue, because the plaintiff at law must recover the place wasted, and that would be an injustice to the remainder for life which is not forfeited. Under such circumstances equity has a very ancient jurisdiction to grant an injunction (*i*), either at the suit of the owner of the inheritance, or of the mesne remainderman for life (*k*).

The case of *Garth v. Cotton* (*l*) is complicated by other circumstances. The first tenant for life was there not impeachable for waste except voluntary waste, there was a remainder to trustees during his life to preserve contingent remainders, remainder to his first and other sons in tail, remainder to B. in fee. Moreover the waste was committed before a son was born to the first tenant, when the only parties in existence who were beneficially interested were the person who committed the waste and the remainderman in fee who consented thereto. In these circumstances equity granted relief to the mesne tenant in tail long after the waste had been committed. The strongest foundation for the decision was the collusion between the parties to the waste ; but notwithstanding this circumstance, always so unfavourably regarded in equity, the plaintiff could not have succeeded had it not been for the intermediate estate limited to trustees to preserve contingent remainders. Their duty it was to have interfered to stay the waste at the time, so as to preserve the whole inheritance, and it was expressly decided that their neglect or ignorance of their duty could not be allowed to prejudice the tenant in tail, though not *in esse* when the waste was completed.

So also where there was a limitation to A. for life, remainder to trustees to preserve, &c., remainder to his first and other sons in tail, remainder to B. for life, remainder to his first and other sons in tail, with reversion in fee to

(*i*) *Tracy v. T.*, 1 Vern. 23.

Ca, Ab, 400.

(*k*) *Dayrell v. Champneys*, 1 Eq.

(*l*) *Sup.*

A., an injunction against waste by A. was granted on the prayer of B. (*m*).

Trustees to
preserve
contingent
remain-
ders.

Although by virtue of 8 & 9 Vict. c. 106, s. 8, and 40 & 41 Vict. c. 33, the insertion of a limitation to trustees to preserve contingent remainders is no longer necessary for the purpose for which it was originally designed, *Garth v. Cotton*, and other similar cases, indicate that it may still serve a useful effect; because, though by virtue of these statutes such trustees will not be required where the intermediate tenant who may be damnified by collusive destruction is *in esse*, and able to seek his own remedy, nevertheless such trustees may, if appointed, pray for the restraining of waste before the intermediate tenant comes into *esse*, when in their absence there would be no one capable of taking action for the purpose. Where there is a mesne tenant *in esse*, it would not seem to matter, since 40 & 41 Vict. c. 33, whether the preceding estate is for life or for years. In either case, on the principle of *Garth v. Cotton*, the remedy would avail for the mesne tenant, even in the absence of trustees.

Devisee in
fee, with
executory
devise
over.

As to executory devises, after some doubts (*n*) it seems to be settled that a devisee in fee, with an executory devise over on his death without leaving issue, may be restrained from equitable, but not from legal waste (*o*), though a testator could make such a tenant impeachable for legal waste by express words (*p*).

Waste by
person
under
adverse
title.

Where a plaintiff in possession sought an injunction to restrain waste by a person claiming under an adverse title, the tendency of the Court was to grant the relief prayed, at least when the acts complained of did or might tend to the destruction of the estate (*q*); and now, by Judicature Act, 1873, s. 25, sub-s. 8, such an injunction is expressly placed within the discretion of the Court.

(*m*) *Perrot v. P.*, 3 Atk. 94.

(*n*) *Robinson v. Litton*, 3 Atk. 309;

Stansfield v. Habbergham, 10 Ves. 278.

(*o*) *Turner v. Wright*, 1 Johns.
740; 2 De G. F. & J. 234.

(*p*) *Blake v. Peters*, 1 De G. J. &
S. 345.

(*q*) *Lowndes v. Bettie*, 10 Jur. N. S.
226; 12 W. R. 399.

Though tenants in common will not in general be restrained from committing either ordinary or equitable waste, equity will interfere between them to prevent malicious or destructive waste—as, for instance, cutting saplings and timber trees or underwood at unseasonable times (r). And under special circumstances ordinary waste has been restrained—for instance, where the parties interested were only equitable tenants in common, and the one who was committing the waste not only was not entitled to the possession, but was also insolvent, and unable to pay to his co-tenants their shares of the produce of the waste (s). After a decree has been made in a partition suit between such tenants, the Court has jurisdiction to restrain waste (t).

Waste by
tenants in
common.

A ground landlord may have an injunction to stay waste against an under-lessee, where the original lessee, by collusion or neglect, does not seek to restrain it (u).

Under-
lessee.

(c.) *Equitable remedies.*

(1.) The jurisdiction of equity in matters of waste is not less due to the superior remedial processes which it commands, than to the broader principles which it applies. At common law, previous to the addition to its power effected by 17 & 18 Vict. c. 125, there existed no power to interfere with the commission of waste generally. The injured party could at most recover damages to indemnify himself after the wrong had been done. On the contrary, equity could always be appealed to where a single act of waste could be established, to interfere by injunction to restrain the offending party from any further acts of like nature; and this whether the waste complained of were legal or equitable (x). Again, while common law was hampered in its estimation of damages by the want of the machinery requisite for examining lengthy matters of account, which

Superiority of
equitable
remedies.

(r) *Hole v. Thomas*, 7 Ves. 589; *Clegg v. C.*, 3 Giff. 322, 336.

(s) *Smallman v. Onions*, 3 Bro. C. C. 621.

(t) *Wright v. Atkyns*, 1 V. & B. 313.

(u) *Farrant v. Lovel*, 3 Atk. 723.

(x) *Coffin v. C.*, 6 Madd. 17.

are the usual concomitants of such suits as those arising from wrongful waste, equity could readily undertake such inquiries, and conduct them to a certain issue.

Account,
whether
incident
only to
injunction.

(2.) A question has arisen respecting the relation of these remedies one to another, which is illustrated by *Garth v. Cotton* (y). There it was objected that, although it was admitted that a bill might have been maintained by the trustees to preserve contingent remainders, to stay waste before it was committed, yet it did not follow that after that was over a bill would lie for an account: and it was argued that the jurisdiction to decree an account was only incident to the jurisdiction to grant an injunction. The point of the objection is that after the waste has been committed the dispute between the parties is only one of pecuniary loss, the complete and proper remedy for which is by action at law. This reasoning was successful in *Jesus College v. Bloom* (z), and *Smith v. Cooke* (a), where the jurisdiction to decree an account was considered to arise as an incident of the power to restrain by injunction, and to have no existence where, there being no possibility of a repetition of the offence, an injunction could not be required. But in *Garth v. Cotton* the objection did not prevail; the obvious distinction between that and the other named cases being that here there never was a legal remedy which might have been appealed to, and unless an account had been granted, a wrong would have been done the plaintiff, and he would have been nevertheless left without remedy. This distinction was pointed out and the whole question fully discussed in *Parrot v. Palmer* (b), where the conclusion was reached, which, with the exceptions to be presently referred to, may be accepted as expressing the true principle, viz., that where there was a remedy at law for waste, an account would not be decreed except as incident to an injunction; but that where there was only a remedy in equity, as would always be the case

(y) *Sup.*, p. 642.

(z) 3 Atk. 262; Amb. 54.

(a) 3 Atk. 381.

(b) 3 My. & K. 632.

where equitable waste was charged, an account would be granted, although there was no injunction. In the case, however, of mining waste, an account will always be decreed, although no injunction is asked (*c*). And it should be remarked that the distinction thus laid down was not recognised by Lord Thurlow in *Lee v. Alston* (*d*), where an account was decreed notwithstanding the existence of a legal remedy and that no injunction was prayed.

(3.) The next question is as to whom timber and other materials subject to waste, when severed, belongs. The answer to this depends on the mode of severance. This may either be by the act of God, or by the act of the defendant or a third party, or by order of the Court. Each case requires separate examination.

(i.) As a general rule, where by the act of God, as by a tempest, things are severed from the inheritance while a tenant for life impeachable for waste is in possession, whether materials of a house, timber, or the produce of mines, they will become at once the property of the owner of the first estate of inheritance *in esse* (*e*), even although there may be an intervening estate of freehold in a tenant for life without impeachment of waste (*f*).

A tenant for life, however, is entitled to have the benefit arising from the sale of all such things severed by the act of God, as he was entitled himself to sever (*g*). If, therefore, the tenant for life is not impeachable for waste, things severed which would amount in the other circumstance to legal waste, belong to him; but things, such as ornamental timber, which equity would restrain even him from severing, will belong to the first owner of the inheritance *in esse* (*h*).

(ii.) If things are severed from the inheritance by a

(*c*) *B. of Winchester v. Knight*, 1 P. Wms. 406.

(*d*) 1 Bro. C. C. 194; 3 *ibid.* 37; 1 Ves. 78.

(*e*) *Uvedall v. U.*, 2 Roll. Ab. 119.

(*f*) *Pigot v. Bullock*, 1 Ves. 484;

Gent v. Harrison, Johns. 517, 524.

(*g*) *Bateman v. Hotchkin*, 31 Beav. 486.

(*h*) *M. of Ormond v. Kyngersley*, 7 L. J. O. S. Ch. 150; 8 *ibid.* 67; *Wellesley v. W.*, 6 Sim. 497.

To whom
proceeds
of timber
belong.

Severed by
act of God.

When
tenant
for life
entitled.

When

severed by trespasser or tenants. trespasser, or by the waste of tenants, or by the life tenant impeachable for waste (without collusion with the owner of the inheritance), the rule is generally the same as if it were severed by the act of God (*i*). There are, indeed, cases of non-collusive severance by the life tenant in which it has been said that the proceeds of sale ought to be laid out in the purchase of stock, and the interest of the fund paid to the successive tenants for life (*k*).

Following also the analogy of acts done by a tenant for life impeachable for waste, which though falling within the general definition of legal waste are under the circumstances considered permissible, where a tenant not impeachable for waste commits acts which generally would amount to equitable waste, but does so under circumstances under which the Court would have ordered them, he is entitled to the proceeds (*l*).

Where, however, such things have been severed by the tenant for years or for life impeachable for waste in collusion with the first owner of the inheritance, equity will not allow the owner of the inheritance to benefit thereby, but will order the fund thereby produced to be invested so as to follow the uses of the settlement of the land, or, if a prior owner of the inheritance comes subsequently into existence, will order it to be paid to him (*m*). Moreover, if the life tenant has in himself the next existent state of inheritance, subject to intermediate contingent remainders, he will not be allowed to take advantage of his own wrong in committing waste; but the benefit thereof will be preserved for the contingent remainder-men by investment to follow the uses of the settlement (*n*). Circumstances, however, which seem to justify the acts of the

(*i*) *Uredall v. U.*, 2 Roll. Ab. 119; *Honywood v. H.*, 18 Eq. 311.

(*k*) *Lushington v. Boldero*, 15 Beav. 1, 7; *Bateman v. Hotchkin*, 31 Beav. 486; *Bagot v. B.*, 32 Beav. 523.

(*l*) *Baker v. Sebright*, 13 Ch. D.

179.

(*m*) *Garth v. Cotton*, *sup.*, p. 642.

(*n*) *Williams v. Bolton*, 3 P. Wms. 268, cited; *Poulett v. Bolton*, 3 Ves. 374; *Seagram v. Knight*, 2 Ch. 628.

life tenant, for instance, the contemporaneous expenditure of an equal or greater sum of money by him in improvements, have sufficed to prevent the application of this rule (*o*).

(iii.) If things are severed from the inheritance by order of the Court (*e.g.*, timber is ordered to be felled on account of its being in decay, or interfering with the growth of other timber), it will direct the interest of the proceeds to be paid to the tenant for life, though impeachable for waste (*p*), and as such timber money will be considered as realty, on the death of a tenant in fee, first owner of the inheritance, if he has done nothing to convert it into personalty, his heir will be entitled to it (*q*). When severed by order of Court,

The rule is the same where a trustee has felled timber and the Court has adopted his act (*r*). The Court will, however, never so adopt the act of a tenant for life impeachable for waste who takes upon himself to cut and sell timber without authority: he does this at his peril, and can take no advantage from it (*s*). or by trustee.

The produce of the sale of underwood, timber cut periodically, and gravel from pits already open, will be paid to the tenant for life, though impeachable for waste, as being part of the income of the estate (*t*). Periodical cutting.

(4.) Where a tenant for life impeachable for waste fells timber, the act being tortious, the remainderman having the inheritance might either have brought an action of trover for the trees, which became his property the moment they were felled, or an action for money had and received for the produce of the sale; or he might have sought an injunction and account in equity. The Statute of Limitations would, however, in the absence of disability in the owner of the inheritance, begin to run from the time the timber was felled; and his remedy would be barred after Statute of Limitations.

(*o*) *Birch-Wolfe v. Wolfe*, 9 Eq. 683, 691.

(*r*) *Waldo v. W.*, 12 Sim. 107, 112.

(*p*) *Tooker v. Annesley*, 5 Sim. 235; *Tollemache v. T.*, 1 Ha. 456.

(*s*) *Seagram v. Knight*, 2 Ch. 632.

(*t*) *Couley v. Wellesley*, 1 Eq. 656.

(*q*) *Field v. Brown*, 27 Beav. 90.

the expiration of six years (*u*). If the tenant for life is also owner of the inheritance, a claim by a subsequent tenant for life only arises at his death; therefore the statute only commences to run from that time (*x*).

It has been held that where equitable waste had been committed by a tenant for life, time did not run against the tenant in tail in remainder until he came into possession on the death of the life tenant; and that from that time twenty years (which will now presumably be twelve, by 37 & 38 Vict. c. 57) would be given him, the claim for equitable waste being treated as a claim to the land itself (*y*). But see *Morris v. M.* (*z*).

The questions arising on this point are also much discussed in *Seagram v. Knight* (*a*).

2. Injunctions against trespass.

In many respects analogous to the jurisdiction to restrain waste is that which enables Courts of equity to grant the protection of injunction in certain cases of trespass.

The principles of the jurisdiction are precisely those which govern the whole class of injunctions in aid of legal rights. The Court requires to be assured of the existence of the legal right, that a breach of the right is imminent, and that irreparable or at least serious damage is likely to result (*b*).

Origin and
nature of
the juris-
diction.

The jurisdiction to grant relief in cases of mere trespass, as distinguished from waste (in which there is privity of title between the parties), seems to have been first asserted in *Flamang's Case* (*c*), where the plaintiff was in possession of a close, and the defendant was working into his minerals and taking away the very substance of his estate. It has since been repeatedly asserted in cases falling within the above-mentioned conditions (*d*).

(*u*) *Higginbotham v. Hawkins*, 7 Ch. 676.

(*x*) *Birch-Wolfe v. Wolfe*, 9 Eq. 683.

(*y*) *D. of Leeds v. Amherst*, 2 Ph. 117.

(*z*) 4 Jur. N. S. 964.

(*a*) 3 Eq. 402.

(*b*) *Supra*, pp. 634-5.

(*c*) Cited 6 Ves. 147; 7 Ves. 308.

(*d*) *Mitchell v. Dors*, 6 Ves. 147; *Hanson v. Gardiner*, 7 *ibid.* 305.

In *Lowndes v. Bettle* (e) the various authorities were elaborately reviewed by Kindersley, V.-C. The distinction was there drawn between those cases in which the defendant and those in which the plaintiff was in possession. It was said that in the former case the Court would require the plaintiff to establish stronger grounds for interference than in the latter, and would, indeed, refuse relief unless there were fraud or collusion, or the acts complained of tended to the destruction of the estate. But this distinction has now ceased to be of importance, since it has been enacted that if an injunction is asked, either before or at the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such an injunction may be granted, if the Court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim the right to do the act sought to be restrained under any colour of title; and whether the estates claimed by both or either of the parties are legal or equitable (f). This section increases to some extent the power of the Court, but it has been held not to alter the main principles on which injunctions are granted (g).

These principles have been already generally stated, and a few illustrations of their application is all that is further necessary.

A mere ordinary, naked trespass will not be restrained by injunction (h). Thus the Court has refused to restrain a person from vexatiously distraining on the tenants of the plaintiff (i). But an act not of itself amounting to serious damage may by continuance or repetition be held to come within the remedy of injunction (k).

If the alleged trespass consists in the erection of works

Naked
trespass
not re-
strained.

Erection of

(e) 33 L. J. Ch. 451.

(f) Jud. Act, 1873; 36 & 37 Vict. c. 66, s. 25, sub-s. 8.

(g) *Giaskin v. Bulls*, 13 Ch. D. 324.

(h) *Mogg v. M.*, 2 Dick. 670.

(i) *Best v. Drake*, 11 Ha. 369; *Aldis v. Fraser*, 15 Beav. 220.

(k) *L. & N. W. R. v. L. & Y. R.*, 4 Eq. 178; *Allen v. Martin*, 20 Eq. 465.

buildings,
when re-
strained.

or buildings on the plaintiff's land, an injunction may be had as long as they are in an incomplete state (*l*); but if they have been completed the plaintiff will generally be left to his remedy by damages (*m*). This rule has, however, been departed from and an injunction granted where the conduct of the defendant has been fraudulent, vexatious, or oppressive, and where the trespass has been of an exceptionally serious nature (*n*).

Trespass
by public
companies.

The remedy of injunction in cases of trespass is more readily granted against public companies or corporations having compulsory statutory powers than against private persons; and generally the plaintiff is not required to show destructive or irreparable damage. An equity is raised on the plaintiff's behalf by the fact of the power and resources commonly enjoyed by such public bodies, the Court being always disposed to keep them strictly within the terms of the authority conferred upon them (*o*). In these cases the inclination to grant the special relief of equity is so strong, that it will only be refused in cases where the damage is so slight as to be almost inappreciable, or where the ordinary legal remedy is evidently adequate and sufficient (*p*). Where the dispute is between two incorporated companies, the same principles apply as in ordinary cases (*q*).

Trespasses
affecting
public
interest.

In cases of trespass, as in those respecting nuisances, if the act complained of affects the public interest, the proper remedy is by information at the suit of the Attorney-General (*r*). But if, in addition to the interference with a public right, special damage is done to a private person, he has a right to sue (*s*); so that in

(*l*) *Farrow v. Vansittart*, 1 Ra. Ca. 602.

(*m*) *Deere v. Cust*, 1 My. & C. 516.

(*n*) *Powell v. Aikin*, 4 K. & J. 343; *Bowser v. Maclean*, 2 De G. F. & J. 415.

(*o*) *Kerr, Inj.*, p. 120; *Kemp v. L. & B. R. Co.*, 1 Ra. Ca. 495.

(*p*) *Turner v. Blamire*, 1 Drew,

409; *River Dun &c. Co. v. N. M. R. Co.*, 1 Ra. Ca. 121.

(*q*) *M. S. & L. R. Co. v. G. N. R. Co.*, 9 Ha. 284.

(*r*) *Att.-G. v. Cleaver*, 18 Ves. 217; *Att.-G. v. Forbes*, 2 My. & C. 133.

(*s*) *Semple v. L. & B. R. Co.*, 9 Sim. 209.

such a case there may be both an information and an action (*t*).

A plaintiff seeking the interference of the Court to restrain a trespass must be prompt in making his application. Relief will be refused if he has stood by and allowed another to spend money on his property upon the faith that no objection will be made (*u*). Plaintiff must be prompt.

In cases of trespass, as in others, the remedy of account is often incident to that of injunction. This is especially the case in mining suits. The rule in these is that if the plaintiff knew, or with reasonable diligence might have known, of the wrongful taking, the account will be limited to six years (*x*). But in the absence of such knowledge or negligence, or if the defendant has acted wittingly, and *à fortiori* if he has been guilty of concealment or fraud, the account is not so limited (*y*); and the trespasser may be charged the full value of the minerals taken, without allowance for the expense of severing them (*z*). Moreover, an inquiry is often directed with a view to allowing the plaintiff compensation for any damage which may have been done (*a*). Inquiry as to damages.

3. *Injunctions against nuisances.*

A nuisance, as distinguished from a trespass, is an act which causes substantial injury to the corporeal or incorporeal hereditaments of other persons unaccompanied by any invasion of the property itself (*b*). Nuisance defined.

In considering the now well-established jurisdiction of equity to restrain nuisances, it is in the first place most material to distinguish between private and public nuisances. A private nuisance is one which affects the comfort or enjoyment of only one individual, or, at most, Public and private nuisances distinguished.

(*t*) *Att.-G. v. Sheffield Gas Co.*, 3 De G. M. & G. 304; *Att.-G. v. U. K. Telegraph Co.*, 30 Beav. 287.

(*u*) *Gordon v. Cheltenham R. Co.*, 5 Beav. 229; *Marker v. M.*, 9 Hæ. 16.

(*x*) *Dean v. Thwaite*, 21 Beav. 623; *Daves v. Bagnall*, 23 W. R. 690.

(*y*) *Eccl. Commis. v. N. E. R. Co.*, 4 Ch. D. 845.

(*z*) *Philippa v. Homfray*, 6 Ch. 770; *Llynvi Co. v. Brogden*, 11 Eq. 188.

(*a*) *Hunt v. Peake*, Johns. 705; *Jegon v. Vivian*, 6 Ch. 742.

(*b*) *Kerr, Inj.*, 165.

a limited class of individuals. A public nuisance is one which similarly affects all persons who come within the sphere of its operation. The importance of the distinction lies in the fact that in the case of a private nuisance the injured person has a personal right to a civil action for its redress, though it is not in every case that he will be entitled to the special remedy of injunction: the circumstances which warrant this will be presently considered. The proper remedy for a public nuisance, on the other hand, is an information at the suit of the Attorney-General (*c*).

Nuisance
both public
and
private.

If, however, the act complained of is of such a nature as at the same time to interfere with the comfort or enjoyment of all within its reach, and to cause a special and distinct injury to a limited class of persons, it is both a public and private nuisance, and the person causing it is obnoxious to both remedies. The person or persons suffering the special damage may bring an action; and at the same time the Attorney-General may proceed on behalf of the public (*d*). But in order to justify the private action, the injury done to the plaintiff must be of a different character from that which he suffers in common with the public. It does not suffice that from his mere proximity to the nuisance he happens to suffer more inconvenience than others (*e*).

Nuisance
or not a
question
for jury

It would lead us too far afield here to enter upon an investigation of the extensive subject as to what constitutes a public or private nuisance. Such an inquiry is more appropriate to a treatise on common law. The question of nuisance or no nuisance is eminently one of fact for a jury, and though, by virtue of 25 & 26 Vict. c. 42 (*f*), or under the more recent provisions of the Judicature Acts, it may be tried in the Chancery Division, it

(*c*) See *Soltau v. De Held*, 2 Sim. N. S. 142.

(*d*) *Att.-G. v. U. K. Telegraph Co.*, 30 Beav. 287.

(*e*) *Ware v. Regent's Canal Co.*, 3 De G. & J. 212.

(*f*) Rolt's Act.

involves no distinctively equitable principles. Our concern is merely with those special circumstances which call for the peculiar remedy of injunction.

Nor is it necessary here to repeat at length those general conditions, already stated, which are always required by Courts of equity before they will grant this assistance in aid of a legal right. In these as in other cases the plaintiff must show that the legal remedy of damages would not afford an adequate compensation; and this generally requires proof that the injury will be permanent, or constantly recurring, or irreparable (*g*). As in cases of trespass, so here, a mere threatened injury will not generally suffice to call forth the interference of the Court. But if a man insists upon his right to do the act complained of, that is a sufficient ground to justify an injunction, even though no nuisance has been actually committed (*h*); and there are other cases in which the Court has so interfered before the nuisance has been committed, on clear proof that the act sought to be restrained will inevitably result in injury (*i*).

General principles.

It now only remains to illustrate the application of the remedy from the cases most usually occurring in practice.

(1.) One large class of cases to which the remedy of injunction is appropriate consists of those in which the right for which protection is sought concerns the enjoyment of dwelling-houses or places of manufacture or business.

Nuisances affecting houses.

With respect to such cases generally, it must be observed that there exists no hard and fast line by which to determine whether or not an act amounts to a nuisance. This depends upon the circumstances of the case; for instance, the purpose for which the house is used, and the character of the neighbourhood. An act may amount to an action-

Generally.

(*g*) *Fishmongers' Co. v. East India Co.*, 1 Dick. 163; *Wynstanley v. Lee*, 2 Swanst. 335.

(*h*) *Elliott v. N. E. R. Co.*, 1 J. & H. 156; 2 De G. F. & J. 423; 10

H. L. 333; *Pennington v. Brinsop &c. Co.*, 5 Ch. D. 769.

(*i*) *Haines v. Taylor*, 2 Ph. 209; *Dawson v. Paver*, 5 Ha. 430.

able injury to a dwelling-house which would not be so with respect to a manufactory; and an act may be deemed a nuisance in a sanatorium which would not be so in the vicinity of wharves (*k*). Moreover, the question will not be determined by the standard of persons of elegant and dainty habits, but by the simple notions of those in ordinary life (*l*).

Ancient
lights.

A multitude of cases falling within this class concern the right to light and air. A right to the free passage of light and air may be acquired by grant or express agreement, or by enjoyment for such time and under such circumstances as will satisfy the Prescription Act (*m*); and when so acquired a substantial interference therewith is actionable. But in order to be so it must be sufficient in degree to constitute a real injury, and not mere inconvenience to the plaintiff, a question of difficulty which of course no general expressions can decide (*n*); and practically speaking, when the injury is sufficient to warrant an action at law, an injunction may be obtained in equity (*o*).

General
rule as to
distance.

The Court will not usually restrain the erection of a building the height of which above the ancient light is not greater than the distance between the building and the light (*p*). The fact of the building being at such a distance is *primâ facie*, but not conclusive, evidence that it will not cause a sufficient interference with the light to warrant an injunction. In such cases the Court will only restrain the building on special evidence of injury (*q*).

New erec-
tions in
place of
old ones.

An owner of ancient lights, who in rebuilding or altering his house puts in new windows or enlarges old ones, acquires no right to a greater amount of light than he enjoyed before, but he retains his right to as much light

(*k*) *Jackson v. D. of Newcastle*, 3 De G. J. & S. 284; *Kelk v. Pearson*, 6 Ch. 811.

(*l*) *Walter v. Selfe*, 41 De G. & S. 322.

(*m*) 2 & 3 Will. IV., c. 71. See Williams' R. P., p. 451, 11th ed.

(*n*) *Back v. Stacey*, 2 Car. & P. 465.

(*o*) *Leech v. Schweder*, 9 Ch. 476.

(*p*) *Beadel v. Perry*, 3 Eq. 466.

(*q*) *City of London Brewery Co. v. Tennant*, 9 Ch. 212.

as before, or rather to as much light as he could obtain through windows of the same aperture as the old ones (*r*); and it is not necessary that the new house should be for all purposes identical with the old one (*s*).

There is no easement in English law corresponding to the servitude *ne prospectui officiatur* in Roman law. However much the obstruction of a view may interfere with the enjoyment or depreciate the value of property, it affords no ground for an action (*t*). *A fortiori* the mere unsightliness of a building (*u*), or the fact that it overlooks grounds previously private gives no title to legal or equitable relief (*x*). And though the easement above referred to is commonly described as a right to light and air, there seems to be no case in which an obstruction to the free passage of air has been made the basis of an action, or has been seriously considered in the estimation of damages. It has been said that it is only in very rare and special cases, involving danger to health, or at least something very nearly approaching to it, that the Court would be justified in interfering on the ground of diminution of air (*y*).

The right to *purity* of air is an easement of quite a different kind, quite independent of grant or prescription; and any considerable pollution thereof is a nuisance which may be restrained (*z*). It depends greatly on the locality what degree of interference will be sufficient to ground an action. In any case there must be a sensible and real damage inflicted. A right to carry on an offensive trade may be acquired by prescription, but no length of time can legalise a public nuisance (*a*).

(*r*) *Turner v. Spooner*, 1 Dr. & Sm. 467; *Aynsley v. Glover*, 10 Ch. 286.
 (*s*) *National, &c. Co. v. Prudential Ass. Co.*, 26 W. R. 27.
 (*t*) *Aldred's Ca.*, 9 Co. 58 a; *Potts v. Smith*, 6 Eq. 315.
 (*u*) *Att.-G. v. Doughty*, 2 Ves. jr. 453.
 (*x*) *Jones v. Tapling*, 12 C. B.

N. S. 842.
 (*y*) *Per Lord Selborne*, 9 Ch. 221; and see *Radcliffe v. D. of Portland*, 3 Giff. 702.
 (*z*) *Aldred's Ca.*, *sup*; *St. Helens Smelting Co. v. Tipping*, 11 H. L. 642.
 (*a*) *Weld v. Hornby*, 7 East, 199.

Noises.

If, again, real damage or great inconvenience is occasioned by the carrying on of a noisy trade or otherwise causing excessive noise or vibration, an action may be brought and an injunction obtained to restrain its continuance. Here, again, the decision depends greatly on the locality; and each case must be decided on its own circumstances.

Rights to lateral support of land;

(2.) Another extensive and important class of cases rests on the right of a landowner to the lateral support of his land in its natural state. This right is a common law right altogether independent of prescription. He may, therefore, restrain his neighbour from so digging into the adjacent soil as to cause a subsidence of the surface of his land. No action lies until damage has actually been done; but when this has happened, it is no defence to show that the works causing the damage have been carried on with care and skill (*b*).

of buildings.

But the right to the support of a building by the adjacent soil of an adjacent owner is of a different nature. This is not a natural right of property; it is an easement which can be acquired by prescription from the time of legal memory, or by grant express or implied: but it is not within the Prescription Act (*c*). It may, moreover, be acquired by the circumstance that the building has stood for twenty years, if during that period the owner of the adjacent soil knew, or might have known, that the building was thereby supported and was capable of making a grant; and after twenty years' enjoyment in point of fact the claim to the right will not be defeated by proof that no grant of the easement was ever made (*d*).

As between adjoining houses, no right to lateral support is acquired by long enjoyment (*e*). The only case in which it can be asserted seems to be where both houses have been so built as to be mutually dependent on each other, and the owner of both alienates one of them. He may then claim

(*b*) *Hunt v. Peake*, John. 710.

162; 6 App. C. 740.

(*c*) 2 & 3 Will. IV. c. 71.

(*e*) *Peyton v. Mayor of London*,

(*d*) *Angus v. Dalton*, 4 Q. B. D.

9 B. & C. 736.

in respect of the house he retains the support which it in return affords to the other (*f*).

(3.) Another large class of nuisances which often provoke equitable interference, relates to rights respecting water. All acts done by a man on his own land, whereby the rights of his neighbour respecting water are injuriously affected, or whereby water becomes a cause of damage to the land of his neighbour, are considered as nuisances relating to water (*g*). Rights
respecting
water,

We cannot digress into a particular account of the various rights to water. They may be conveniently classified as rights respecting quantity, and rights respecting quality.

The riparian proprietors have a right to the use of the water which flows by their land, and this right is incident to the ownership of the adjacent soil. And the right being enjoyed by the successive proprietors along the bank, none may so interfere with the water as to prejudice those above or below him, unless, of course, he has some special title to exclusive enjoyment. He may therefore be restrained from diverting the stream, or materially diminishing the quantity which would naturally flow to his neighbours below (*h*); or, on the other hand, from damming back the stream so as to cause an overflow on the land of his neighbour above him. as to
quantity,

Secondly, a riparian proprietor has a right to a natural stream in a natural state of purity. He may therefore restrain the fouling of the water, and this without even proof of actual injury (*i*). And it is immaterial that the stream was previously in some degree polluted. The right is as clear to prevent an increase of pollution as to prevent pollution in the first instance (*k*). and
quality.

The rights respecting artificial watercourses must, how- Artificial

(*f*) *Richards v. Rose*, 9 Ex. 218.

(*g*) *Kerr Inj.* p. 224.

(*h*) *Ferrand v. Corp. of Bradford*,
21 Beav. 412.

(*i*) *Crossley v. Lightowler*, 2 Ch.
478; *Pennington v. Brinsop, &c. Co.*,

5 Ch. D. 772.

(*k*) *Ibid.*

water-
courses.

ever, be carefully distinguished from the above. The water in an artificial stream is the property of the person by whom it is created or caused to flow. In the absence of long enjoyment he has no right to discharge it on the land of another; while his neighbour cannot claim the continuance of the flow, notwithstanding that a right to discharge it may have been acquired by the producer (*l*).

Navigable
rivers.

The public rights in navigable rivers are likewise frequently protected by means of the remedy of injunction. These rights may be infringed either by buildings, &c., which interfere with the public right of navigation, or by the fouling of rivers in such a manner as to be injurious to the public health, or destructive of a fishery (*m*); and where a sufficient case of injury is established, the nuisance may be restrained at the suit of the Attorney-General.

Other
nuisances.

It must suffice merely to mention other extensive classes of nuisances which are dealt with on the principles already amply expounded; for instance, obstructions of public highways and private rights of way, obstructions of the sea-shore and of ferries, markets, commons, &c.

Nuisances
authorised
by statute.

Before dismissing the subject of nuisances, it must be observed that when a statutory power has been conferred to do an act which otherwise might have been actionable, the person so protected is not amenable to the process of the Court as long as he confines himself strictly to the limits of the power conferred upon him. The unlawful character of the act is taken away by the sanction of the legislature, however injurious it may be (*n*). Such powers when conferred must, however, be strictly complied with. Any injurious act which is not covered by their provisions brings the offender at once within the reach of the law (*o*).

(*l*) Kerr Inj. 235.

(*m*) See *Att.-G. v. Lonsdale*, 7 Eq. 388; *Att.-G. v. Terry*, 9 Ch. 423; *Att.-G. v. Mayor, &c. of Kingston-upon-Thames*, 34 L. J. Ch. 481;

Bridges v. Highton, 11 L. T. N. S. 653.

(*n*) *Rex v. Pease*, 4 B. & A. 30.

(*o*) *Att.-G. v. Leeds Corp.*, 5 Ch. 591; *Clowes v. Staffordshire Potteries Co.*, 8 Ch. 139.

Injunctions against libel, &c.

Abundant illustrations have been given of the application of the remedy of injunction to restrain the commission of torts. Moreover, it is clear that equity will not interfere by injunction to restrain the commission of a crime. But there is a class of offences which partakes both of the nature of a tort and of that of a crime, inasmuch as a breach of the rights to which they refer renders the offender at once liable to a civil action and to criminal proceedings. The most conspicuous illustration of such offences is afforded by cases of libel; and it is necessary to inquire whether or not equity will interfere by injunction in such cases.

Now the general purpose on which injunctions are granted is for the protection of property; and unless the plaintiff can show that injury to his property is threatened, equity will not assist him. It is evident that the offence of libel will rarely come within this condition; and accordingly we find that as a rule an injunction cannot be obtained to restrain a publication of this character (*p*). But in a recent case in which the nature of the libel complained of was to injure the plaintiffs in their trade, an injunction was granted (*q*). It is evident, however, on both principle and authority, that no such relief could be obtained in the case of a merely personal slander or abuse (*r*).

Crimes
not re-
strained.

Libel,
when re-
strained.

II. *Injunctions protecting Patent Rights, Copyright and Trade Marks.*

It is convenient to class together the rights here mentioned, since though they are in themselves strongly contrasted, the jurisdiction of equity respecting them rests on the same foundation, namely, the desirability of preventing a multiplicity of suits and vexatious litigation.

Grounds of
the juris-
diction.

(*p*) *Mulkern v. Ward*, 13 Eq. 619; *Massam*, 14 Ch. D. 763.
Prudential Ass. Co. v. Knott, 10 Ch. (r) See also *Day v. Brownrigg*,
 142. 10 Ch. D. 294.
 (*q*) *Thorley's Cattle Food Co. v.*

Inade-
quacy of
the remedy
at law.

The rights in themselves are fully recognised at law, and have always sufficed to ground an action at law for damages. But it is evident that such a remedy supplies an exceedingly inadequate protection. Not only might the patentee, or author, or owner of a trade mark be compelled to bring innumerable actions, and thus be ruined by interminable litigation, but in many cases damages, even if recovered, would afford an insufficient redress for the injury sustained. The business or the reputation might be impaired by the interference pending the litigation, in a manner and to an extent which no inquiry could ascertain (*r*). And further, the facility for taking accounts afforded by equity, and yet more conspicuously its power of peremptorily stopping the infringement of the right by injunction, plainly indicate the appropriateness of the jurisdiction of its Courts for dealing with such matters.

It must suffice very briefly to describe the rights themselves here under review, the particular object being to ascertain under what circumstances an aggrieved party can obtain an injunction against an infringement of them.

1. *Patent rights.*

Origin of
patents.

(1.) The abuse of the royal prerogative of granting patents for monopolies, and the disputes which arose therefrom, are well-known matters of English history, and need not be here recapitulated (*s*). Suffice it to say, that the result thereof was the statute 21 Jac. I. c. 3, which abolished the general power of granting monopolies and patents, but by express reservation excepted the power of granting letters patent for the term of fourteen years or under to the inventor of any new manufacture, provided it were not contrary to law nor mischievous to the State (*t*). On this statute rest the patent rights now enjoyed by inventors.

21 Jac. I.
c. 3.

(*r*) *Hogg v. Kirby*, 8 Ves. 223.

(*s*) See *Mompesson's Case*, 2 How.

St. Tr. 1119.

(*t*) Sect. 6.

The first question which arises is as to what may be the subject of the right.

It is to be observed that the statute uses only the term "manufacture," and that it does not at all enlarge on the right as previously existing at common law. The subject-matter of a patent must therefore come within this term, and must be for a legal purpose. It would be supererogatory to trace the course of the decisions by which these conditions are now in some degree defined: it is sufficient to briefly summarise their results.

The word "manufacture" not only comprehends any-thing made, but also the mode, method or process of making a thing; it comprises, therefore, not only vendible articles, the result of chemical or mechanical processes, but new machines or new combinations of machinery, or an improvement of an old process (*u*).

It is, however, to be particularly observed, that a bare principle cannot be the subject of a patent. For instance, no one could obtain a patent for the mere idea of utilising electricity as a motor power (*x*). The discovery of a principle is not an invention in the sense of patent law. The means must be shown of practically applying the principle (*y*). This distinguishes a principle from a process.

Secondly, the invention must be new. It is not indeed necessary that the object produced should be of a species unknown before, but the process of making it must be the true and original invention of the person seeking protection; original not only in the sense that he derived it from no one, but in the sense that no one had used it before (*z*). Previous sale even by the inventor himself would avoid the patent (*a*). Previous user beyond the realm is, however, no objection to a patent (*b*).

(*u*) *Kerr Inj.* 282; *Johnson's Pat. Man.* 5; *Crane v. Price*, 4 Mac. & G. 580; *Ralston v. Smith*, 11 H. L. 223.

(*x*) *Jupe v. Pratt*, 1 W. P. C. 145; *Dangerfield v. Jones*, 13 L. T. N. S. 142.

(*y*) *Boulton v. Bull*, 2 H. Bl. 463.

(*z*) *Tennant's Ca.*, *Dav. on Pat.* 429.

(*a*) *Wood v. Zimmer*, 1 Holt N. P. C. 58.

(*b*) *Edgeberry v. Stephens*, 2 Salk. 447.

Utility. Thirdly, it must be useful; but this word is applied with considerable latitude (*b*).

Procedure. These are, briefly stated, the conditions which determine what may be the subject of a patent right. But not only must the matter for which protection is sought fall within these conditions; the inventor must also, in order to procure patent privilege, closely follow the procedure laid down, the most important element in which is the specification.

Specification. The specification, which must be enrolled in Chancery, must particularly describe and ascertain the nature of the invention, and show how it is to be applied and carried into effect, the test of a good specification being "whether a workman of ordinary skill can from merely reading it make the thing of which it is the specification" (*c*). It must contain the best and fullest information of the patentee respecting the object of the patent (*d*). As with regard to the objects of patents, so with regard to procedure, it is impossible here to enter into detail. To attempt to do so without occupying a considerable space would only tend to delude the student. Reference should be made to the Patent Act, 1852 (*e*).

15 & 16
Vict. c. 83.

What
amounts to
infringe-
ment.

(2.) A patent is infringed when a man directly or indirectly uses the protected invention, or produces the same result by means only colourably different. Similarity in principle between two machines will not constitute an infringement, if the mode of operation is different, though the same result may be attained (*f*); nor is there an infringement in the application of a patented machine to a different purpose from that for which it was patented (*g*). It is an infringement to offer patented articles for sale, though no sale takes place (*h*), or to buy or sell in the way of trade, articles made by a machine which is itself an

(*b*) *Manton v. Parker*, Dav. P. C. 327.

(*c*) *Per Lord Campbell*, 8 E. & B. 937. See *Plimpton v. Malcolmson*, 3 Ch. D. 569.

(*d*) *Ibid.* *Neilson v. Harford*, 8

M. & W. 806.

(*e*) 15 & 16 Vict. c. 83.

(*f*) *Seed v. Higgins*, 8 H. L. 550.

(*g*) *Newton v. Vaucher*, 6 Ex. 859.

(*h*) *Oxley v. Holden*, 8 C. B. N. S.

666.

infringement (*i*). It is immaterial whether there is or is not an intention to infringe (*k*); even ignorance of the existence of the patent is no answer (*l*).

When the question as to infringement depends on the construction of the specification only, it is a question of law for the judge; when it depends on the degree of difference or similarity between two things, it is a mixed question of law and fact. In as far as it is a question of fact it is for the jury; the finding of the jury as to the fact is applied according to law by the judge (*m*).

(3.) Such being a brief review of the nature and conditions of patent right, we may now intelligibly observe the application for its protection of the equitable remedies.

i. The injunctions sought in patent cases are usually of the interlocutory species. One of the leading authorities on the principles of the Court respecting them is

HILL v. THOMPSON

[3 Mer. 622],

which not only substantiates and illustrates what has been above stated as regards the necessity for novelty and utility in the invention (*n*), but also clearly expresses the circumstances under which an injunction would be granted. From that case it appears that with respect to patents which have been for a long time in the exclusive enjoyment of the plaintiff, equity would presume an exclusive right, and would restrain a defendant from infringement thereof without requiring him to establish its validity at law, but that in the case of recently granted patents it would not interpose by injunction until the right had been established at law (*o*). But if a good *prima facie* case is made out the Court has jurisdiction to interfere notwithstanding the recency of the

(*i*) *Wright v. Hitchcock*, L. R. 5 Ex. 38.

(*k*) *Heath v. Unwin*, 15 Sim. 552.

(*l*) *Curtis v. Platt*, 3 Ch. D. 138, n.

(*m*) *Kerr Inj.* 310.

(*n*) P. 629.

(*o*) See also *Univ. of O. & C. v. Richardson*, 6 Ves. 689; *Maumhan v. Tegg*, 2 Russ. 385.

patent (*p*). The plaintiff must in any case show *both* a *primâ facie* title to the patent, and a *primâ facie* case of infringement (*q*).

When the legal right must be established.

If the Court is satisfied of the validity of the patent and of the fact of the infringement, it may grant an injunction at once without requiring the plaintiff to establish his legal right; but it will rarely do this if either the validity of the patent or the fact of infringement is denied. In such cases the Court will usually put the plaintiff to a trial of the right, either in the meanwhile protecting him by interim injunction, or ordering the motion to stand over until the right has been tried; the defendant meanwhile keeping an account, and the plaintiff giving an undertaking as to damages. The Court will, in its discretion, follow whichever of these courses appears most convenient under the circumstances of the case (*r*).

Proper diligence required.

A plaintiff who seeks the aid of the Court must apply with proper diligence. Any open encouragement or acquiescence in the invasion of his right, especially knowingly permitting the defendant to expend monies upon the faith of non-interference, will bar his right to the extraordinary interference of equity (*s*).

There are other equitable remedies incident to the protection of patents which may here be advantageously noticed.

Inspection.

ii. Sometimes an owner of a patent can only obtain satisfactory proof of infringement by means of an inspection of the defendant's premises. And if a *primâ facie* case of this nature is made out, the Court may require the defendant to submit to such inspection, subject to such restrictions and conditions as it sees fit (*t*). The order may be made on interlocutory application (*u*). By a similar

(*p*) *Plimpton v. Spiller*, 4 Ch. D. 286.

(*q*) *Bridson v. Macalpine*, 8 Beav. 230; *Caldwell v. Vanelessen*, 9 Ha. 424; *Bickford v. Skewes*, 4 My. & Cr. 500.

(*r*) *Kerr Inj.* 274; *Bacon v. Jones*, 4 My. & Cr. 436; *Renard v. Levinstein*, 2 H. & M. 628; *Plimpton v. Malcolmson*, 29 Eq. 37; *Plimpton*

v. Spiller, *sup.*

(*s*) *Bridson v. Benecke*, 12 Beav. 1; *Bovill v. Crate*, 1 Eq. 388.

(*t*) *Bennitt v. Whitehouse*, 28 Beav. 121; *Singer, &c. Co. v. Wilson*, 13 W. R. 560.

(*u*) *Ennor v. Barwell*, 1 De G. F. & J. 529.

jurisdiction samples may be ordered to be delivered up for analysis (*x*).

iii. The right to an account of profits in respect of Account. articles manufactured or sold in violation of patent rights is incident to a right to an injunction to restrain future infringements. There can be no account if the case for an injunction fails, or if at the hearing there is nothing on which an injunction can operate (*y*). If an account is decreed it extends to all the profits arising from the infringement for six years previous to the action (*z*).

The aggrieved patentee may elect between an account and an inquiry as to damages. He cannot have both (*a*). Election between account and inquiry as to damages. He may, however, have an account against the manufacturer, and also an inquiry as to damages against a person using the article (*b*). The Court will enforce discovery by the defendant of such facts as to sales, &c., as may be needed in the inquiry to ascertain the damages (*c*).

2. Copyright.

(1.) It is now established that copyright exists only by statute (*d*). The term designates the exclusive right of multiplying a work of literature or art after its publication (*e*). The right commences by publication (*f*), and the publication must be in this country (*g*). Copyright is declared by statute to be personal property (*h*), and it therefore descends to the owner's legal personal representatives. Origin of the right.

There are many different species of copyright, differing in accordance with the nature of the subject-matter to which it refers. Various species of copyright.

Literary copyright depends upon the statute 5 & 6 Vict. Literary

(*x*) *Patent, &c. Co. v. Walter*, John. 727.

(*y*) *Kerr Inj.* 312; *Baily v. Taylor*, 1 R. & M. 73; *Smith v. L. & S. W. R.*, Kay, 415.

(*z*) *Crossley v. Derby Gas Co.*, 1 Webst. 119; 4 L. J. Ch. N. S. 25.

(*a*) *Neilson v. Betts*, 5 L. R. H. L. 22; *De Vitre v. Betts*, 6 ib. 321.

(*b*) *Penn v. Bibby*, 3 Eq. 308.

(*c*) *Howe v. M'Kernan*, 30 Beav. 547; *Saxby v. Easterbrook*, 7 L. R. Ex. 207.

(*d*) *Jefferys v. Boosey*, 4 H. L. 833.

(*e*) *Ibid.* 920.

(*f*) *Ibid.* 815.

(*g*) *Routledge v. Low*, 3 ibid. 100.

(*h*) 5 & 6 Vict. c. 45, s. 25.

copyright,
5 & 6 Vict.
c. 45.

c. 45, which defines it to be the sole exclusive liberty of printing or otherwise multiplying copies of any subject included in the word book as therein comprehensively defined. Copyright in books published in the lifetime of the author is the property of the author, or his assigns, during his life and seven years afterwards, or for forty-two years, if the latter be the longer term. The copyright in books published after the author's death lasts for forty-two years (*i*).

What may
be subject
thereof.

To come within the protection of the Copyrights Acts, a work need not consist of new or original matter. A compilation of old materials, or materials open to the research of all men may be the subject of copyright. Thus copyright may exist in a directory (*k*), a calendar (*l*), or a catalogue (*m*). But there can be no copyright in a book the publication of which is illegal on the ground of immorality, indecency, sedition, or blasphemy (*n*).

Copyright in articles contributed to encyclopædias, magazines or other periodical publications is especially regulated by section 18 of the Act, which provides that the copyright therein shall on payment be the property of the proprietor of the publication for twenty-eight years, and that from that time the right of publishing the articles in a separate form shall revert to the author for the remainder of the period given by the Act.

Lectures,
5 & 6 Will.
IV. c. 65.

Copyright in lectures, which was the subject of discussion in *Abernethy v. Hutchinson* (*o*), is specially provided for by another statute (*p*).

Private
letters.

As to private letters, generally speaking the writer may restrain their publication by the person to whom they are addressed, or by any third party (*q*), and the person receiv-

(*i*) Sect. 3.
(*k*) *Kelly v. Hooper*, 4 Jur. 21.
(*l*) *Longman v. Winchester*, 16 Ves. 269.
(*m*) *Hotten v. Arthur*, 1 H. & M. 603; *Grace v. Newman*, 19 Eq. 624.
(*n*) *Stockdale v. Onychyn*, 5 B. & C.

173; *Walcot v. Walker*, 7 Ves. 1;
Southey v. Sherwood, 2 Mer. 435.
(*o*) 1 H. & Tw. 40.
(*p*) 5 & 6 Will. IV. c. 65.
(*q*) *Pope v. Curl*, 2 Atk. 342;
Gee v. Pritchard, 2 Swanst. 402.

ing a letter may restrain its publication by a stranger (*r*). But these rights are liable to be qualified by considerations of public policy, or by some personal equity (*s*). The publication of unpublished manuscripts may clearly be restrained by the persons to whom they belong (*t*).

(2.) It is not possible here to do more than cursorily glance at the wide and intricate subject of the infringement of copyright; neither is it possible to indicate by general expressions what amounts to an infringement. A subsequent writer may, of course, make references to and quotations from a prior publication; but he may not do so to such an extent as to sensibly diminish the value of the original (*u*). The question is whether a material and substantial part of the prior work has been taken (*x*), and it is evident that the solution of this will often be extremely difficult. Especially is this the case where the pirated work is, like a calendar or directory, compiled from materials open to every one. In such cases similarity approaching almost to identity is inevitable, and almost the only means by which the fact of piracy can be sustained is by showing a community of errors. A *bond fide* abridgment of a book is not piracy (*y*), but here again the difficulty is great in drawing the line between good and bad faith. The tendency of modern decisions is to restrict rather than to extend the latitude allowed in some of the earlier cases in this respect (*z*).

(3.) Copyright in dramatic and musical pieces differs in many respects from purely literary copyright. Literary copyright extends only to the multiplication of copies, but this being an insufficient protection for dramatic authors and composers, restrictions on public representation and

What amounts to infringement.

General view.

Dramatic and musical copyright.

(*r*) *Granard v. Dunkin*, 1 Ba. & Be. 207; *Thompson v. Stanhope*, Amb. 737.

(*s*) *Percival v. Phipp*, 2 V. & B. 19; *Drew Inj.* 208, 209.

(*t*) *Queensberry v. Shebbeare*, 2 Eden. 329; *Prince Albert v. Strange*, 1 Mac. & G. 25.

(*u*) *Scott v. Stanford*, 3 Eq. 718.

(*x*) *Chatterton v. Cave*, 2 C. P. D. 42.

(*y*) *Newbery's Ca.*, Lofft. R. 775; *Dickens v. Lee*, 8 Jur. 184.

(*z*) *Tinsley v. Lacy*, 1 H. & M. 747; *Dickens v. Lee*, *supra*.

3 & 4 Will. IV. c. 15. performance have been provided in addition by 3 & 4 Will. IV. c. 15, and 5 & 6 Vict. c. 45; and the first public representation or performance is in respect of such works equivalent to publication. Public representation or performance of such a work, or of a material and substantial part thereof, amounts to an infringement of the copy-right (*b*). Penalties are by statute (*c*) imposed for such infringements; but none the less an injunction may be obtained to restrain an intended infringer (*d*).

Copyright
in prints,
&c.

(4.) Copyright in prints, engravings and etchings depends on the statutes 8 Geo. II. c. 13, 7 Geo. III. c. 38, and 17 Geo. III. c. 57. The protection has been extended to sculpture by 54 Geo. III. c. 56, to lithographs by 15 & 16 Vict. c. 12, s. 14, and to original paintings, drawings and photographs by 25 & 26 Vict. c. 28. Every copy of such works which comes so near to the original as to give the same idea created by the original is an infringement (*e*), and this includes any copy made by photography or other chemical process (*f*).

Copyright
in designs
for orna-
ment,

(5) Copyright in designs for ornament is regulated by 5 & 6 Vict. c. 100, 6 & 7 Vict. c. 65, 13 & 14 Vict. c. 104, 21 & 22 Vict. c. 70, and 24 & 25 Vict. c. 73; the duration of the protection differing according to the articles protected (*g*). A design within these statutes need not necessarily be a new invention; a combination of old materials may be protected if the design be new (*h*).

and de-
signs for
utility.

Designs for utility are protected by 6 & 7 Vict. c. 65 and 13 & 14 Vict. c. 104, and have reference to the shape or configuration of an article as conducive to its utility. The statutes do not apply to a combination of old designs, or to inventions or new applications however useful; except in

(*b*) *Reade v. Lacy*, 1 J. & H. 524;
Chatterton v. Cave, 2 C. P. D. 42.

(*c*) 3 & 4 Will. IV. c. 15.

(*d*) *Russell v. Smith*, 15 Sim. 181.

(*e*) *West v. Francis*, 5 B. & Ald.
743; *Moore v. Clark*, 9 M. & W.
692.

(*f*) *Gambart v. Bull*, 14 C. B.
N. S. 306; *Graves v. Ashford*, 2
L. R. C. P. 410.

(*g*) See *Grave's Ca.*, 4 L. R. Q. B.
715.

(*h*) *Holdsworth v. Macrae*, 2 L. R.
H. L. 380.

so far as the shape and configuration confer utility upon the invention (*i*).

The foregoing very general descriptions must here suffice to indicate the nature of the various species of copyright. For further details, and in particular as to the question of international copyright, reference should be made to works specially devoted to the subject.

(6.) The proprietor of a copyright cannot, generally speaking, maintain an action in respect of the infringement of his right, until his copyright has been registered (*k*); and he can obtain no injunction until the defendant's work has been published (*l*). It is not, however, necessary that he should show a clear legal title. A fair *primâ facie* title, or a clear colour of title, legal or equitable, is sufficient, even though limited in point of time or extent (*m*).

Action,
when
maintain-
able.
Registra-
tion.

Primâ facie
title suffi-
cient.

Delay or acquiescence, unless adequately explained, will be fatal to the claim (*n*), as also will participation in the conduct complained of (*o*). Under 5 & 6 Vict. c. 45, s. 26, all actions must be commenced within twelve months of the offence.

Plaintiff
must be
diligent.

The injunction may be granted against the whole or a part of the work, according to the extent of the piracy (*p*); the whole will be included if the pirated part is so intermixed with the original matter as to be practically inseparable (*q*). In copyright, as in patent cases, an interlocutory injunction if granted usually determines the action. The plaintiff is, however, entitled to a perpetual injunction, and this will be decreed with costs at the hearing, unless the defendant has submitted to the interlocutory injunction, and offered to pay the costs up to that time (*r*).

Nature of
the injunc-
tion.

Whatever relief is required by the plaintiff, as incident

Discovery.

(*i*) *Rogers v. Driver*, 16 Q. B. 102.

(*k*) See 5 & 6 Vict. c. 45, s. 24, and the various other statutes referred to.

(*l*) *Morris v. Wright*, 5 Ch. 279.

(*m*) *Univ. of O. & C. v. Richardson*, 6 Ves. 689; *Nichol v. Stockdale*, 3 Swanst. 687.

(*n*) *Mawman v. Tegg*, 2 Russ. 393.

(*o*) *Rundell v. Murray*, Jac. 311.

(*p*) *Lewis v. Fullarton*, 2 Beav. 6.

(*q*) *Mawman v. Tegg*, *sup.*; *Kelly v. Morris*, 1 Eq. 697.

(*r*) *Millington v. Fox*, 3 My. & Cr. 352.

to the right to an injunction, may be decreed to him. Thus he may have discovery of the original sources from which the defendant alleges that he has taken his work (*s*).

Account.

A right to an account of profits is also incident to the injunction (*t*). By statute the plaintiff is also entitled to delivery up of all copies of the defendant's work (*u*).

In deciding the question of piracy, the Court now usually inspects the work itself (*x*).

3. *Trade marks.*

A third species of right for the protection of which the remedy of injunction is peculiarly suitable, is that to the exclusive use of a trade mark.

General principles of trade-marks.

(1.) No man has a right to sell his goods as being the goods of another manufacturer or trader. If, therefore, some particular mark or symbol has come to be recognised in trade as the mark of the goods of a particular person, another person cannot lawfully mark his goods with that mark so as to induce a purchaser to believe that they are the goods of the person entitled to use the mark (*y*). The right is limited to the use of the mark in connexion with a particular class of goods ; that is to say, it would be no infringement to mark goods of a different class with the same symbol (*z*). Moreover, if an article has acquired a certain name in the market, which name indicates its nature rather than its being of a particular manufacture, any man may call it by that name, though in the first place it may have been the name of the inventor or original maker (*a*).

What may be a trade-mark.

(2.) Any name, symbol, or emblem which is not merely descriptive of an article, or which does not denote the general character of a business, may constitute a trade

(*s*) *Kelly v. Wyman*, 17 W. R. 399.

(*t*) *Baily v. Taylor*, 1 R. & M. 73 ; *Colburn v. Simms*, 2 Ha. 560.

(*u*) 5 & 6 Vict. c. 45, s. 23 ; *Macrae v. Holdsworth*, 2 De G. & S. 497.

(*x*) *Lewis v. Fullarton*, 2 Beav. 6.

(*y*) *Perry v. Truefitt*, 6 Beav. 66.

(*z*) *Edelsten v. E.*, 1 De G. J. & S. 185.

(*a*) *Hall v. Barrows*, 4 De G. J. & S. 150 ; *Bury v. Bedford*, *ibid.*, 352.

mark (b). No person other than the original inventor, or those claiming through him, may use such words as "the original" or "the only genuine" as a trade mark (c); but a man cannot be prevented from calling goods by his own name merely because someone of the same name invented the goods or made them before him (d). The same principle applies in the case of a partnership name, if the use of the name be *bonâ fide*; but the Court will not suffer a name to be used for the purpose of having the benefit of the reputation which another firm has acquired. This amounts to a fraud on the public (e).

(3.) By the Trade Marks' Registration Act, 1875 (f), registration of a trade mark was required before proceedings to prevent its infringement could be instituted. The Amendment Act of 1876, however, provides that want of registration shall not be conclusive against the right to take proceedings, a certificate of refusal of registration being sufficient to enable the owner to proceed (g). In this, as in other cases, prompt action must be taken by the plaintiff after discovery of the fraud. Delay or acquiescence will bar his remedy (h).

(4.) As to what amounts to colourable imitation or infringement, reference may be made to *Leather Cloth Co. v. American Cloth Co.* (i), *Seixo v. Provezende* (k), and the cases therein cited. Almost all that can be laid down respecting this question in general terms is that the resemblance must be such as to deceive an ordinary purchaser; it is sufficient if it be calculated to deceive even the unwary; and it is not incumbent on the plaintiff to show that any one has been actually deceived. On the other hand, it has

(b) *Braham v. Bustard*, 1 H. & M. 447; *Burgess v. B.*, 3 De G. M. & G. 896; *Raggett v. Findlater*, 17 Eq. 29.

(c) *Cocks v. Chandler*, 11 Eq. 449; *James v. J.*, 13 Eq. 425.

(d) *Burgess v. B.*, *sup.*

(e) *Croft v. Day*, 7 Beav. 84; *Singer &c. v. Wilson*, 2 Ch. D. 453; *Massam v. Thorley &c. Co.*, 14 Ch.

D. 748.

(f) 38 & 39 Vict. c. 91.

(g) 39 & 40 Vict. c. 33; *Exp. Stephens*, 3 Ch. D. 659; *Re Barrow's Trade Marks*, 5 Ch. D. 353.

(h) *Motley v. Downman*, 3 My. & Cr. 1; *Lee v. Haley*, 5 Ch. 160.

(i) 11 H. L. 523.

(k) 1 Ch. 192.

Registration.
38 & 39

Vict. c. 91.

39 & 40

Vict. c. 33.

What
amounts to
imitation.

been held that the fact of one person having been actually deceived is not conclusive proof of an improper imitation (*l*). Each case must be judged on its own merits.

Remedies. (5.) Incident to the remedy of injunction in cases of infringement is the right to an account of the profits made by the illegal user (*m*). An innocent vendor of goods spuriously marked is, however, not liable to an account, except in respect of sales made after he has acquired knowledge of the wrong (*n*).

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| (<i>l</i>) <i>Civil Service Supply Ass. v. Dean</i> , 13 Ch. D. 512. | 244. |
| (<i>m</i>) <i>Burgess v. Hills</i> , 26 Beav. | 578. |
| (<i>n</i>) <i>Moet v. Couston</i> , 33 Beav. | |

CHAPTER VII.

INSTANCES OF JURISDICTION ANALOGOUS TO INJUNCTION.

- I. *Cancellation and Delivery up of Documents.*
- II. *Actions to establish Wills.*
- III. *Actions Quia Timet.*
- IV. *Actions in the nature of Bills of Peace.*
- V. *Writ of Ne Exeat Regno.*
- VI. *Actions to perpetuate Testimony.*

I. *Cancellation and Delivery up of Documents.*

Courts of equity have long been wont to entertain suits which seek the cancellation, rescission, or delivery up of instruments, when there is a danger of their being improperly employed for the injury of the plaintiff. Grounds of the jurisdiction.

It often happens that agreements, securities, or deeds which have answered the purposes for which they were created, or which are voidable or even entirely void, have nevertheless an appearance of validity, and may therefore be used by an ill-disposed person for purposes of annoyance, vexation, and fraud. In such circumstances, no preventive remedy could be obtained at law, and a useful field was accordingly left for the peculiar jurisdiction of equity (a).

It is apparent that the relief sought in such cases bears some resemblance to that of Specific Performance ; and as Remedy discretionary.

(a) Story, 692.

in that case, so in this, the exercise of the jurisdiction is eminently a matter within the discretion of the Court. A decree cannot be demanded as a matter of right; the Court will consider all the circumstances of the case, and impose such conditions as it thinks fit (*b*). It remains to consider in what cases, and under what circumstances, equity will grant the relief desired.

When
granted.

There are three classes of instruments to be particularly considered: First, those which are utterly void; secondly, those which are voidable; thirdly, those which are in themselves unexceptionable, but to which the plaintiff has a title as against the defendant.

1. Void
instru-
ments.

1. As to void instruments, it was at one time questioned whether Courts of equity ought to interfere to procure their cancellation or delivery up. It was argued against the jurisdiction, that such instruments being of no effect at law, there was no necessity for any equitable interference respecting them; and further that if an equitable remedy was needed, the proper course would be the issuing of a perpetual injunction against the use of the instrument (*c*).

Relief
granted
unless
illegality is
apparent
on their
face.

On the other hand, more recent cases have proceeded on the principle that if there is a real danger that such an instrument may be injuriously used, that alone supplies sufficient ground for equitable interference (*d*).

The question whether the Court would or would not interfere, therefore, resolved itself into the question whether the instrument was of such a nature as to admit of injurious use. If so, it would be ordered to be delivered up; if not, equity would not interpose.

Not if it
is so.

If, then, the illegality of the instrument, whether agreement, security, or deed, is apparent on the face of it, so that its nullity can admit of no doubt, there is no sufficient ground for seeking equitable assistance respecting it. Such a document is plainly innocuous; no lapse of time

(*b*) Story, 693; *Goring v. Nash*,
3 Atk. 188.

(*c*) Story, 698; *Hilton v. Barrow*,
1 Ves. jr. 284; *Ryan v. Mackmath*,

3 Bro. C. C. 15, 16.

(*d*) Swanston's note to *Davis v.*
D. of Marlborough, 2 Swanst. 157.

can add to its power so as to render it dangerous. Illustrations are supplied by instruments which on their face disclose an illegal consideration, or the fact that they have been fully satisfied (*e*). Equity, which will do nothing which is useless, will not interfere in such cases.

Where, however, an instrument, though in fact void, has an appearance of validity, the case is otherwise. Then there exists a material danger against which protection may reasonably be sought. Thus a deed purporting to convey hereditaments, as long as it remains in hostile hands, has a tendency to throw a cloud on the title (*f*); a mere written agreement may be used vexatiously and improperly (*g*); and in such cases lapse of time only adds to the danger, by rendering it more difficult to procure the evidence necessary to expose the fraud (*h*). In all such cases equity considers it against conscience for a party to hold or retain the mischievous document, and its jurisdiction to order delivery up and cancellation is well established. Forged instruments have similarly been held to be delivered up, without any prior trial at law as to the forgery (*i*).

Cases in which equity has granted relief.

2. As to voidable instruments, it is not now necessary to repeat what has already been said under the headings of Fraud and Mistake (*k*) respecting the circumstances which will give a person the option of avoiding his own acts. The present question has a close connexion with what was there stated, and referring thereto, it may be briefly answered—

Voidable instruments.

Equity will set aside and cancel a voidable agreement or security:—

(1.) When the defendant has been guilty of actual fraud, in which the plaintiff has not participated.

Cancelled on ground of fraud in defendant.

(*e*) *Simpson v. Howden*, 3 My. & Cr. 97; *Smyth v. Griffin*, 13 Sim. 245; *Threlfall v. Lunt*, 7 Sim. 627.

(*f*) *Pierce v. Webb*, 3 Bro. C. C. 16; *Byne v. Vivian*, 5 Ves. 607.

(*g*) *Bromley v. Holland*, 7 Ves.

20.

(*h*) *Kemp v. Prior*, 7 Ves. 248.

(*i*) *Peake v. Highfield*, 1 Russ. 559; *Johnston v. Renton*, 9 Eq. 181.

(*k*) pp. 139, *et seq.*, 186, *et seq.*

This is the simplest and clearest case, plainly conformable to the elementary rule that a man shall not be allowed to reap an advantage from his own fraud against one who is innocent.

(2.) Where the plaintiff, as well as the defendant, has in some degree participated in the fraud, but they are not *in pari delicto*.

Plaintiff must be innocent, or not *in paridelicto*.

It is a general maxim that he who comes into equity must come with clean hands; and as a rule no relief will be given to one who has been guilty of any unconscientious dealing respecting the subject-matter of the suit. But if a fraud has been committed by the defendant, and participated in by the plaintiff, yet if the plaintiff acted under the influence of oppression, imposition, hardship, or other undue influence, such as may arise from great inequality between the ages and conditions of the parties, he may succeed in establishing his claim to relief (*l*).

Relief on grounds of public policy. Even though plaintiff has participated.

(3.) If the transaction has been in effect a fraud upon public policy.

In these cases, as in those last mentioned, relief may be given notwithstanding the participation of the plaintiff in the fraud; the reason in this case is that public policy would be defeated by allowing the transaction to stand. Thus gaming securities have on this ground been decreed to be given up (*m*), and other agreements founded on immoral considerations cancelled (*n*).

Save, however, in these two exceptional cases, equity will peremptorily refuse its assistance to one who has himself been guilty of fraud, whether actual or constructive (*o*).

Valid instruments.

3. Lastly, we have to consider those cases in which the plaintiff seeks the delivery up of an instrument, not on the ground of any equity arising out of the nature of the instrument itself, but because he has an equitable right as

Relief on

(*l*) *Osborne v. Williams*, 18 Ves. 379; *Bosanquet v. Dashwood*, Ca. t. Talb. 37, 40, 41.

(*m*) *Milltown v. Stewart*, 3 My. & Cr. 18.

(*n*) *W. v. B.*, 32 Beav. 574.

(*o*) *Franco v. Bolton*, 3 Ves. 386; *St. John v. St. J.*, 11 *ib.* 535;

Ayerst v. Jenkins, 16 Eq. 275.

against the defendant to its possession or custody. In ^{ground of title.} these cases there is of course no question as to cancellation; the relief sought is simply delivery up.

A person is entitled to the title-deeds of his own property; thus heirs-at-law, devisees, and other persons properly entitled to the custody and possession of the title-deeds of their property may come into equity and obtain a decree for the specific delivery of them (*p*); and the same doctrine applies to other instruments, such as bonds, negotiable instruments, &c., which are detained from persons who have a legal or equitable interest in them (*q*).

In such cases the Courts of Common Law could not afford complete redress, since the prescribed forms of their remedies rarely enabled them to pronounce a judgment *in rem*.

Similarly, remaindermen and reversioners, and other persons having limited or ulterior interests in real estate, may in many cases take measures in equity to secure the preservation of their title-deeds (*r*). The plaintiff must, however, in such cases be prepared to show the necessity for his action by proving that there is some danger of the loss or destruction of the instruments unless protected by the Court, and his interest must not be too remote (*s*).

It may be here observed that voluntary agreements untainted with fraud, although not enforceable in equity, will not be set aside. Unless such a deed reserves a power of revocation, the settlor will be bound thereby (*t*).

Preservation of deeds.

Voluntary settlements not relieved against.

II. *Actions to establish Wills.*

In considering the equitable jurisdiction to establish wills, the student must carefully observe two things: first,

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| (<i>p</i>) <i>Reeves v. R.</i> , 9 Mod. 128; | <i>Stanford v. Roberts</i> , 6 Ch. 307. |
| <i>Tanner v. Wise</i> , 3 P. Wms. 296. | (<i>s</i>) <i>Ivie v. I.</i> , 1 Atk. 431; <i>Ford</i> |
| (<i>q</i>) <i>Kaye v. Moore</i> , 1 S. & S. 61; | <i>v. Peering</i> , 1 Ves. jr. 76. |
| <i>Freeman v. Fairlie</i> , 3 Mer. 30. | (<i>t</i>) <i>Villiers v. Beaumont</i> , 1 Vern. |
| (<i>r</i>) <i>Smith v. Cooke</i> , 3 Atk. 382; | 101; <i>Bill v. Cureton</i> , 2 My. & K. |
| and see <i>Jenner v. Morris</i> , 1 Ch. 603; | 503. |

the distinction between the juristic effects of wills of personalty and wills of realty; secondly, the distinction between disputes as to the validity and disputes as to the construction of wills.

Will of personalty requires legal personal representative,

1. A will of personal property requires for its effectual performance the appointment of a legal personal representative. Usually the will itself provides for this by the appointment of one or more executors. If not, or if those appointed are incapable, the Court supplies the vacancy by the appointment of an administrator. If the will is in other respects valid, the administrator *cum testamento annexo* acts in conformity therewith as an executor. The *persona* of the testator devolves in a measure upon him; he is liable for the debts; the general personalty vests in him, and only passes to the beneficiaries by his consent.

in whom the property vests.

Will of real property is a conveyance to the devisee.

A will of real property, on the other hand, is in effect a conveyance. Putting aside for the present the various steps by which it has become liable to debts, and in some respects placed within the power of the executors, the will itself may be regarded as an assignment of the real estate to the devisee or devisees named.

Former must be proved; latter not so.

A will of personalty, again, is ineffectual until it is proved in the proper Court, and administration granted to the personal representative. A will of realty does not require any such proof; and is of full effect though no personal representative at all be appointed.

Distinction between disputes as to validity and as to construction.

2. The second distinction needs only to be stated. It is evident that the question whether a certain document is or is not a will is quite distinct from the question as to what its language means.

When we speak of the jurisdiction of Courts of equity over wills we refer to the former of these questions. The construction of wills is a matter in which they are continually concerned, and which has already come largely under our consideration in connexion with the administration of assets.

No general

Previous to the Judicature Acts, the Court of Chancery

had no general jurisdiction as to the validity of wills. As regards wills of personal property the Court of Probate, which by virtue of 20 & 21 Vict. c. 77, succeeded in 1857 to the functions of the Ecclesiastical Court, was the proper forum; and the same Court at the same time acquired jurisdiction as to wills of real property, which was formerly exercised by the Courts of Common Pleas and Queen's Bench.

The position of the Court of Chancery with respect to wills is well illustrated by the case of *Allen v. M'Pherson (u)*, in which it was sought to set aside a will of personalty by suit in equity on the ground of undue influence, notwithstanding that it had been admitted to probate in the Ecclesiastical Court; but the bill was dismissed for want of jurisdiction. A similar decision has been much more recently arrived at in a case in which both real and personal property were concerned (*x*). It has indeed been held under the Judicature Acts that the Chancery Division has now concurrent jurisdiction with the Probate Division to grant probate of wills (*y*); but the same case shows that it is most unlikely to put this power into exercise.

But notwithstanding these considerations, and previous to the Judicature Acts, the cases were numerous in which a qualified jurisdiction respecting wills was exercised by Courts of equity.

In the first place, if a will came incidentally before the Court, and its validity had not been admitted or elsewhere established, the Court effectually determined the question. This was done either by directing an issue to be tried at law, or by the production and examination of witnesses in the Court of equity itself; and when the validity of the will was thus once determined, the rights of those claiming under it might be established, if necessary, by a perpetual injunction against the heir (*z*).

(u) 1 H. L. 191.

(x) *Meluish v. Milton*, 3 Ch. D.

27.

(y) *Pinney v. Hunt*, 6 Ch. D. 101.

(z) *Sheffield v. D. of Bucking-*
hamshire, 1 Atk. 628.

As jurisdiction in Chancery as to validity of wills;

not even in cases of fraud.

Incidental jurisdiction before Jud. Acts.

Wills of
pure real
estate
established
in equity.

Secondly, as regards wills purely of real estate, which require neither the appointment of an executor nor a grant of probate, equity had, and seemingly still has, jurisdiction to entertain a suit by a devisee to establish his right against the heir, by means of a perpetual injunction restraining him from contesting its validity in future (*a*). Such action could not have been brought at law, and yet might be necessary for the security of the devisee; since the heir might delay seeking ejectment against him until the evidence was grown obscure. The jurisdiction, therefore, is in some respects analogous to that which empowers interference *quia timet* (*b*).

Boyse v.
Ross-
borough.

A leading authority respecting actions of this nature is *Boyse v. Rossborough* (*c*), where a will was established at the suit of a devisee against an heir, although the heir had brought no ejectment against the devisee, although no trusts were declared by the will, and although there was no necessity for the administration of the estate by the Court. It has also been held that the Court has power to establish such a will not only against the heir, but against all persons setting up adverse claims—for instance, claims depending on a prior will (*d*).

Heir can-
not sue to
contest a
will.

On the other hand, an heir, having a complete legal remedy by action of ejectment, could not have come into equity as plaintiff to contest the validity of a will, except, at least, by consent of the devisee. Under the present practice, these distinctions between the jurisdiction of Courts of law and equity have, of course, ceased to exist.

The combined result of legislation and decision, therefore, practically confines the jurisdiction to establish wills to a very limited number of cases—namely, to wills relating solely to real property.

(*a*) *Bootle v. Blundell*, 19 Ves. 494, 509.

(*b*) *Infra*, p. 683.

(*c*) *Kay*, 71; 1 K. & J. 124; 3

De G. M. & G. 817; 6 H. L. 1.

(*d*) *Ibid.*; *Lovett v. L.*, 3 K. & J. 1.

III. *Actions Quia Timet.*

In certain circumstances equity has jurisdiction to interfere for the protection of a right before any injury has been actually done, and a party who fears a probable invasion of his right may establish an action for his protection without claiming any other relief.

The nature of the relief given depends, of course, upon the circumstances under which it is sought; sometimes it takes the form of the appointment of a receiver of rents or other income; sometimes that of an order to pay a fund into Court; sometimes security is directed to be given; sometimes it suffices merely to issue an injunction (*e*). Nature of relief given *quia timet.*

The object of the action in all cases is to preserve property to its appropriate uses and ends. It must here suffice to adduce a few illustrations of the circumstances which call for and warrant the exercise of the jurisdiction.

1. If property in the hands of a trustee is in danger of being diverted or squandered, to the injury of any claimant having a present or prospective title thereto, the Court will take such measures for its protection as it deems requisite. And the same principle applies to executors or administrators, if there is danger of collusion between them and the debtors of the estate, or of a waste of the estate from any other cause (*f*). Such cases will generally be met by the appointment of a receiver; and when this is done the appointment is made for the benefit of all the parties in interest, and not for that of the plaintiff only (*g*). Preservation of trust property.

The appointment of a receiver rests in the discretion of the Court; and when appointed he is regarded as an officer of the Court, and therefore subject to its orders (*h*): he is commonly required to give security. Appointment of receiver.

2. Where the tenants of a particular estate for life or in Keeping

(*e*) Story, 826.

(*f*) *Ibid.* 827-8; *Taylor v. Allen*, 2 Atk. 213.

(*g*) *Davis v. D. of Marlborough*, 1 Swanst. 83; 2 *ib.* 125.

(*h*) *Skip v. Harwood*, 3 Atk. 564.

- down
incum-
brances. tail neglect to keep down the interest due upon incumbrances, the Court often appoints a receiver to secure the performance of this duty (*i*).
- Protection
of sureties. 3. The jurisdiction is also exercised for the protection of sureties. A surety who apprehends loss from the delay of his creditor to sue the principal debtor may come into equity to compel the discharge of the debt (*k*).
- Protection
of future
rights in
personalty. 4. In all cases in which there is a future right of enjoyment of personal property, and there is danger of loss or deterioration or injury to it in the hands of the party entitled to present possession, equity has power to interpose, and grant relief on an action in the nature of a bill *quia timet* (*l*). Such cases may be met by an order to give security (*m*); or still more effectually by requiring the fund to be paid into Court (*n*). Whenever trust money is traced to hands not entitled to hold it, the Court will, on the application of the *cestui que trusts*, order its payment into Court (*o*).
- Security. Payment
into Court. It is, of course, unnecessary here to dwell upon the circumstances which warrant the granting of injunctions for the protection of property, these having been already copiously illustrated. We need only further observe that the same authority, above quoted, which now enables the Court to grant an injunction by an interlocutory order whenever it seems to be just or convenient, enables it to appoint a receiver in a similar manner and on similar conditions (*p*). This extensive power renders it now unnecessary to consider many restrictions on the jurisdiction which were formerly effective.
- Injunctions.
- Jud. Act,
1873, s. 25,
sub-s. 8.

(*i*) *Giffard v. Hart*, 1 S. & L. 407, n.

(*k*) *Wright v. Simpson*, 6 Ves. 734; and see *Wooldridge v. Norris*, 6 Eq. 410.

(*l*) Story, 845.

(*m*) *Rous v. Noble*, 2 Vern. 249.

(*n*) *Slanning v. Style*, 3 P. Wms. 336.

(*o*) *Leigh v. Macaulay*, 1 Y. & C. Ch. 260; *Bowsher v. Watkins*, 1 R. & M. 277.

(*p*) *Supra*, p. 651; Jud. Act, 1873, s. 25, sub-s. 8.

IV. *Actions in the nature of Bills of Peace.*

In some respects analogous to the remedy last considered is that formerly known as a bill of peace, and now taking the form of an action of the same effect as the former bill.

A bill of peace was one brought to establish and perpetuate a right which from its nature might be controverted by different persons at different times, and by different actions; or where separate attempts had already been made to overthrow the same right, and justice required that the party should be quieted in the right and relieved from the annoyance of continual litigation. In such cases equity, which is always opposed to multiplicity of suits, has jurisdiction to interfere and put an end to the fruitless litigation.

One class of cases in which this remedy is appropriate consists of those in which one general right is to be established against a great number of persons, as where a person has possession and claims a right of fishery on a river, and the riparian proprietors set up several adverse rights (*q*), or where a lord seeks to restrain encroachments by tenants under colour of a common right, or to establish an enclosure which he has approved under the statute of Merton (*r*).

Similar relief may be sought where many persons claim or defend a right against one; as where tenants seek to prevent the disturbance by a lord of a common right (*s*).

But in order to entitle a party to claim the assistance of the Court on these grounds, it must be clear that there is a right claimed which affects many persons, and a

Nature of bills of peace.

The right of one established against many defendants.

The right of many against one.

Conditions of the remedy.

(*q*) *M. of York v. Pilkington*, 1 Atk. 282; *Tenham v. Herbert*, 2 *ib.* 483.

Gardiner, 7 Ves. 305; *D. of Norfolk v. Myers*, 4 Mad. 50, 117.

(*s*) *Conyers v. Aberqavenny*, 1 Atk.

(*r*) 20 Hen. III. c. 4; *Hanson v.*

285; *Phillips v. Hudson*, 2 Ch. 243.

suitable number of parties in interest must be brought before the Court (*t*); and it is to be observed that the Court will not decree a perpetual injunction in contradiction of a public right, such as a right to a highway or to a common navigable river (*u*). On the one hand, the right in question must affect numerous parties; on the other, it must not affect the public at large.

Protec-
tion of
rights well
established
at law.

Another class of cases for which a bill of peace was an apt remedy comprised those in which the plaintiff had after repeated trials established his legal right, but yet was threatened with further litigation from new attempts to controvert it. In such circumstances, the Court was wont to grant a perpetual injunction to quiet the plaintiff's possession, and to suppress future litigation (*x*). It would not, however, interfere until the right had been satisfactorily established at law; but two trials was deemed a sufficient determination of the right to warrant an injunction (*y*).

Rolt's Act.

By 25 & 26 Vict. c. 42, the Court of Chancery was empowered to direct an issue, if necessary, to be tried at the assizes or at *nisi prius*, or to itself decide the question of

Jud. Act

law or fact; and since the Judicature Act the Courts of law could themselves apply the remedy without requiring the defendant to appear as a plaintiff in equity. We have already seen that as regards the various divisions of the High Court of Justice no one division can now restrain proceedings in another. Each can order a stay of its own proceedings whenever there is an equitable claim to it.

V. *Ne Exeat Regno*.

Nature
and origin

The writ of *ne exeat regno* was a prerogative writ, issued to prevent a person from leaving the realm. It

(*t*) Story, 857; *Cowper v. Clerk*, 3 P. Wms. 15.

(*u*) Story, 858; *Hilton v. Scarborough*, 2 Eq. Ca. Ab. 171.

(*x*) *E. of Bath v. Sherwin*, Prec.

Ch. 261; 10 Mod. 1; 4 Bro. P. C. 373.

(*y*) *Devonsher v. Newenham*, 2 S. & L. 208; *Leighton v. L.*, 1 P. Wms. 671.

was originally applied only for political objects and purposes of state, and at present it is exercised for the protection of private rights with much caution and jealousy (z). of the writ.

The writ *ne exeat regno* was as a rule only granted in respect of equitable debts, a plaintiff who had a legal claim being left to his legal remedy. But to this rule there were two exceptions. Granted only for equitable debts,

First, when alimony had been decreed to a wife the writ was procurable to restrain the husband from evading the obligation by leaving the realm (a). The alimony must, however, have been actually decreed, and not appealed from. The writ could not be obtained while the case was still pending (b). except in cases of alimony,

Secondly, where there was an admitted balance due from the defendant to plaintiff, but the plaintiff claimed a larger sum, he might be assisted by the writ (c). This case was brought within the purview of equity by its jurisdiction in matters of account. and where there is admitted balance but larger sum is claimed.

With respect to the equitable demands for which the writ might be issued, they were required to be certain as to their nature, and actually payable, not contingent (d). It must also have been a pecuniary demand, and not of the nature of damages or any unliquidated claim (e). It need not, however, have been directly created between the parties; thus the *cestui que trust* or obligee of a bond was entitled to the writ against the obligor (f). Conditions of the remedy.

Such were the general conditions of the jurisdiction as unaffected by legislation. At present it seems that its scope is completely determined by the following statutes.

(1.) By the Debtors' Act, 1869 (g), which, with certain exceptions, abolished imprisonment for debt, it was enacted that in future no person should be arrested upon mesne Debtors' Act, 1869.

(z) Story, 1465-7.

(d) *Anon.*, 1 Atk. 521; *Rico v. Gaultier*, 3 *ib.* 500.

(a) *Read v. R.*, 1 Ch. Ca. 115;

(e) *Etches v. Lance*, 7 Ves. 417;

Shaftoe v. S., 7 Ves. 71.

Cock v. Ravie, 6 *ib.* 283.

(b) *Ibid.*; *Dawson v. D.*, 7 Ves. 173.

(f) *Grant v. G.*, 3 Russ. 598;

(c) *Jones v. Sampson*, 8 Ves. 593;

Leake v. L., 1 J. & W. 605.

Jones v. Alephsin, 16 Ves. 471.

(g) 32 & 33 Vict. c. 62.

process in any action, but that where the plaintiff in any action in any of the Courts of law at Westminster in which previously the defendant would have been liable to arrest, proves at any time before final judgment by evidence on oath to the satisfaction of the judge that the plaintiff has good cause of action against the defendant to the amount of £50, and that there is probable cause for believing that the defendant is about to quit England, and that his absence will materially prejudice the plaintiff in his action, such judge may order the defendant to be arrested and imprisoned for a period not exceeding six months, unless he gives the prescribed security, not exceeding the amount claimed in the action, that he will not go out of England without the leave of the Court.

Effect of
the Act.

With respect to this enactment it has been held that it has in effect confined the writ of *ne exeat regno* to cases which come within its provisions (*h*), the reasoning being that the jurisdiction of Chancery must follow that of law, and the power of the Courts of law to arrest for legal debts being by this statute restricted, the power of the Courts of equity with respect to equitable debts was subjected to a corresponding restriction. This argument does not seem to have been resorted to in *Sobey v. Sobey* (*i*), in which the writ was issued in the same manner as before the statute (*k*).

Jud. Acts.

(2.) Further, by the Judicature Acts, the distinction between legal and equitable debts has disappeared, so that the reasoning applied by the Master of Rolls in *Drover v. Beyer* is now much stronger than it would have previously been. It is clear from this case, at any rate, that the effect of the Judicature Acts has not been to extend the remedy (*l*).

Abscond-
ing

(3.) It may here be further mentioned that by the Absconding Debtors' Act, 1870 (*m*), power is conferred

(*h*) *Drover v. Beyer*, 13 Ch. D. 242.

(*i*) 15 Eq. 200.

(*k*) And see *Lees v. Patterson*, 7

Ch. D. 866.

(*l*) See Snell's Pples., p. 624.

(*m*) 33 & 34 Vict. c. 76.

upon the Court of Bankruptcy to issue a similar writ under the conditions there prescribed, to prevent a debtor from going abroad after the service upon him of a debtor's summons under the Bankruptcy Act. Debtors' Act, 1870.

VI. *Actions to perpetuate Testimony.*

Circumstances often arise in which public justice requires that measures should be taken to perpetuate evidence of a right which cannot be presently protected by judicial decision. For instance, a person may have a claim to a remainder, or he may be in actual possession of the property in question: in neither case can he directly make his right the subject of a judicial decision; and yet his right may be dependent upon evidence which the lapse of time will weaken or perhaps destroy. In such circumstances it is in the highest degree necessary for him that some measures should be taken to secure or perpetuate this evidence, and so to protect him against some adverse claimant who may be purposely delaying his suit with a view to profit by the loss of the proofs of title. Grounds of the jurisdiction.

Such cases strongly appealed to that principle of equity which declares that it will not suffer a wrong without a remedy. And yet the exercise of a jurisdiction thus to perpetuate testimony was evidently subject to the strong objection that the depositions so taken were not published until after the death of the witnesses. The evidence, therefore, was not given under the sanction of the legal penalties attached to perjury. In consequence of the danger thus attending the process, we find that the Courts of equity were careful only to grant relief of this kind in strong cases, where a failure of justice would be otherwise seriously threatened (*n*). Assistance was refused if by any means open to the plaintiff the whole matter could be at once adjudicated upon (*o*). If, as in the illustrations above Objections thereto, and consequent caution in its exercise.

(*n*) *Angell v. A.*, 1 S. & S. 83.

(*o*) *Ellice v. Roupell*, 32 Beav. 299.

given, this was impossible, equity would exercise the necessary jurisdiction, and take the requisite evidence (*p*).

Applicable
to any
kind of
property.

It is immaterial as regards the exercise of the jurisdiction, whether the subject-matter in question is real or personal estate or of the nature of a mere personal demand, or whether the evidence to be used tends to the proof of the plaintiff's title or is needed for defence (*q*). Equity, however, will do nothing in vain, and it accordingly will not interfere to support a right which is liable to be immediately barred; for instance, it will not entertain an action of this nature by a remainderman against a tenant in tail in possession, who can at any time bar the entail (*r*).

Expect-
ancies.

Formerly, moreover, a mere expectancy, such as that of an heir-at-law, was not deemed sufficient to sustain a bill, though a remote or contingent interest would do so (*s*). But 5 & 6 Vict. c. 69, provided for this case, and extended the remedy by enacting that any person who would under the circumstances alleged by him to exist become entitled upon the happening of any future event to any honour, title, dignity or office, or to any estate or interest in any property, real or personal, the right or claim to which could not by him be brought to trial before the happening of such event, should be entitled to file a bill in Chancery, to perpetuate any testimony which might be material for establishing such claim or right. The terms of this enactment, it will be observed, extend the remedy to claims to titles and dignities; it was previously confined to cases in which the right to some property was in dispute (*t*).

5 & 6 Vict.
c. 69.

Titles and
dignities.

Bills for
discovery
obsolete,

Actions in the nature of bills to perpetuate testimony would seem to have remained unaffected in principle by the Judicature Acts; bills for discovery, on the contrary, which were formerly analogous in many respects thereto, and which formed a conspicuous feature in equitable juris-

(*p*) *Spencer v. Peek*, 3 Eq. 415; 261.
Re Tayleur, 6 Ch. 416.

(*q*) *Story*, 1509; *Suffolk v. Green*,
1 Atk. 450.

(*r*) *Dursley v. Fitzhardinge*, 6 Ves.

(*s*) *Ibid.*

(*t*) *Townshend Peerage Case*, 10 Cl.
& F. 289; and see *Campbell v. E. of*
Dalhousie, 1 L. R. H. L. (Sc.) 462.

diction, have been rendered completely obsolete by the present procedure. It has been, therefore, deemed unnecessary here to discuss them. A study of the Orders under the Judicature Acts, in particular of Order XXXI., in any of the recognised hand-books thereto, will supply ample information as to the present means of attaining the ends formerly sought by bill in Chancery.

Again, it is now scarcely necessary to do more than mention the bills to take evidence *de bene esse*, which once occupied a useful and important place in the auxiliary jurisdiction of equity. The purpose of these bills was to take the testimony of persons resident abroad. They could only be brought while an action was then depending: but they were available as well for a person out of as for one in possession; in both these respects differing from bills to perpetuate testimony. Ample powers of a similar nature were, however, long ago conferred upon the Courts of law (*u*), and at present such matters fall entirely within the province of Procedure, and consequently beyond the scope of this work.

and also
bills *de*
bene esse.

(*u*) 13 Geo. III. c. 63, s. 44; 1 Will. IV. c. 22, s. 1.

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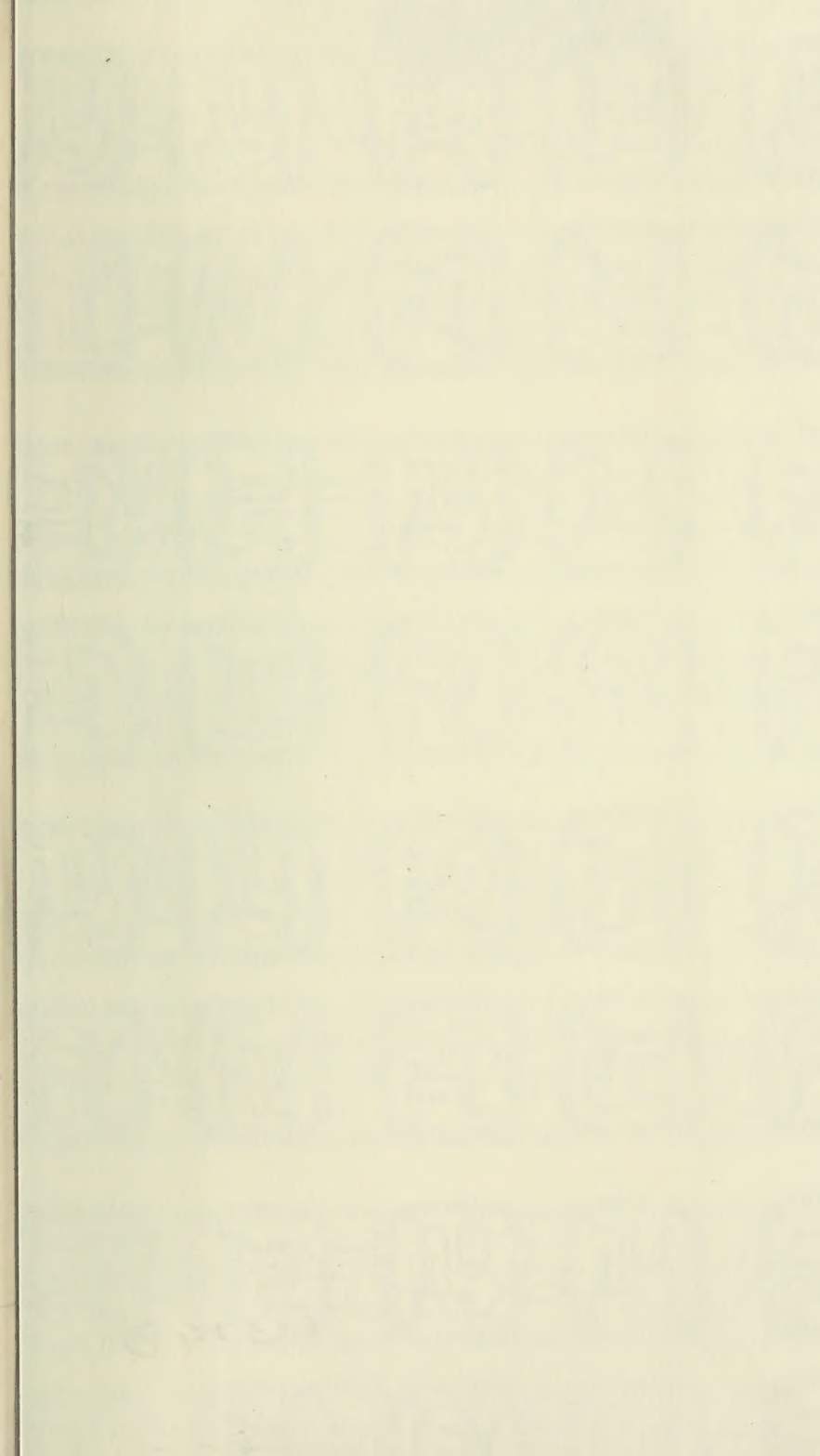
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